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BRIEF FOR PETITIONER

OPINIONS BELOW

The initial opinion of the Florida Supreme Court on direct appeal affirming petitioner's conviction, but remanding his death sentence in light of *Gardner* v. *Florida*, 430 U.S. 349 (1977), is reported in *Spaziano* v. *State*, 393 So.2d 1119 (Fla. 1981), *cert. denied*, 454 U.S. 1037 (1981) and is set out in the Joint Appendix at pages 18-23. The opinion of the Supreme Court of Florida affirming the reimposition of the death sentence is reported at 433 So.2d 508 (Fla. 1983) and is set out at pages 45-51 of the Joint Appendix.

JURISDICTION

The jurisdiction of this Court rests upon 28 U.S.C. § 1257(3), the petitioner having asserted below and asserting herein a deprivation of rights secured by the Constitution of the United States. The judgment of the Supreme Court of Florida was entered on May 26, 1983. A timely motion for rehearing was denied by that court on July 13, 1983. The Honorable Lewis F. Powell, Jr., Associate Justice of the Supreme Court of the United States, issued an order extending the time within which to file a petition for writ of certiorari to and including October 11, 1983. Certiorari was granted on January 9, 1984. ___ U.S. ___, 104 S.Ct. 697 (1984).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States which are set out in Appendix A hereto. This case also involves the following provisions of the statutes and rules of the State of Florida, which are set forth at Appendix A: Fla. Stat. §§ 782.04, 921.141, 932.465, and Fla. R. Crim. Proc. 3.490.

STATEMENT OF THE CASE

On August 21, 1973, the decomposing corpse of a young woman was discovered in a garbage dump in Seminole County, Florida (T 213)[1]. The deceased was identified, by dental records, as Laura Harberts, last seen alive on August 5, 1973.

Joseph Spaziano was indicted by a Seminole County grand jury for the first degree murder of Ms. Harberts on September 12, 1975 (JA 2-3). The state's chief witness was an acquaintance of Mr. Spaziano named Anthony Dilisio, who was sixteen years old at the time of the events in question. He testified that he accompanied petitioner to a dump, for the ostensible reason, according to Dilisio, that petitioner could show him some of the women that he had raped and tortured (T 626-627). Dilisio testified that he saw two female bodies situated in the dump (T 631). He did not report what he had seen to the police (T 689).

The state's case rested exclusively upon the testimony of Dilisio, whose credibility was sharply contested at trial. Petitioner argued that Dilisio was unworthy of belief for several reasons. First, Dilisio had a motive to lie (R 49-50). Second, according to his father, Dilisio had a tendency to exaggerate the truth, although not to the point of being an "extreme" pathological liar (R 182). Third, Dilisio was an admitted drug user before, during and after the alleged incident at the dump. (T 655-657). Fourth, he never testified about the alleged incident at the dump until after he went to a police hypnotist (R 80). Further, Dilisio gave several inconsistent statements

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[1] In the brief, the symbol "JA" will be used to designate references to the Joint Appendix. As to the portions of the record not included in the Joint Appendix, the following symbols will be used:

"T" . . . . . The trial transcript;

"TS" . . . . . The transcript of the original sentencing trial;

"R" . . . . . The record on appeal in the direct appeal;

"RS". . . . . The record on appeal in the resentencing proceedings.

regarding the location of the bodies he allegedly saw and the route taken to arrive there.

Aside from Dilisio the evidence consisted of testimony of two of the deceased's friends and two individuals who had known Mr. Spaziano. The state attempted to prove through the testimony of Beverly Fink and Jack Mallen, the deceased's roommate and the roommate's boyfriend, that Mr. Spaziano knew the deceased prior to her death. Both witnesses testified that an individual they identified as Mr. Spaziano came to the door of the apartment sometime in July and asked to see the deceased (T 401-402, 467-468). However, they identified that individual, who said he was a traveling cook, to be Mr. Spaziano from an arguably suggestive photographic lineup, *see* State's Exhibit 7. Ms. Fink also testified that the deceased was dating several individuals, one of whom was name "Joe", but none of whom was Mr. Spaziano (T 408-409, 410, 411, 437). In addition, William Coppick and Mike Ellis testified that approximately two years prior to the alleged incident, Mr. Spaziano lived in a trailer in the same general area where the deceased's body was found. Mr. Coppick also testified that Mr. Spaziano told him about finding some bones, but never said where or exactly when the alleged conversation took place (T 563, 572). Mr. Ellis further stated that Mr. Spaziano took him to the general area where the body had been found and he concluded that Mr. Spaziano went to get some marijuana "stashed" there (T 599-600, 602-603). Again, Mr. Ellis was unsure of the date when this took place. The medical examiner testified that he conducted an autopsy the morning after the body was discovered (T 292) and found no evidence of trauma (T 294) and could not give an opinion as to the cause of death (T 298).

After the submission of evidence, outside the presence of the jury, the trial judge presented petitioner with the choice of waiving the statute of limitations which had run as to all lesser included noncapital offenses or having the jury instructed only as to first-degree murder. Petitioner chose the latter with the result that the jury was not permitted to consider verdicts of

guilt of lesser included, noncapital offenses (T 751-755). The jury, after deliberating more than five hours and after being given a "jury deadlocked" charge, returned a verdict of guilty of first-degree murder (T 808-820). The same jury recommended that petitioner be sentenced to life imprisonment (TS 28), but the advisory verdict was overridden by the trial judge who sentenced petitioner to death (JA 13). Thereafter, petitioner appealed his conviction and sentence to the Florida Supreme Court, which affirmed the conviction but reversed the death sentence for a violation of *Gardner* v. *Florida*, 430 U.S. 349 (1977), and remanded for a hearing before the trial judge. *Spaziano* v. *State*, 393 So.2d 1119 (Fla. 1981). In that direct appeal petitioner specifically raised the issue regarding the constitutionality of his death sentence under *Beck* v. *Alabama*, 447 U.S. 625 (1980) where the jury had been precluded from considering petitioner's guilt of an offense less than capital homicide. The Supreme Court of Florida squarely reached the federal question in its opinion on direct appeal and ruled that there had been no constitutional violation (JA 22). The federal question was further pursued by petitioner in his motion for rehearing. The court denied rehearing, though the two dissenting justices wanted to consider the question further (JA 24). Petitioner also challenged the constitutional propriety of the imposition of the death sentence over the jury's life verdict, but because of the court's disposition—the *Gardner* remand of the sentence—these questions were not reached.

A *Gardner* resentencing hearing was held on May 8, 1981 in the trial court before the judge only, in accord with the Florida Supreme Court's limited remand. Despite the earlier jury verdict of life, petitioner was again sentenced to death (JA 29).

Petitioner appealed his death sentence to the Florida Supreme Court, which affirmed. *Spaziano* v. *State*, 433 So.2d 508 (1983). In his appeal, petitioner again challenged the propriety of overriding the jury's life verdict. He contended that the override in his case violated the Eighth and Fourteenth Amendments and that it is constitutionally impermissible in all cases to override the jury's verdict for life. The Florida Su-

preme Court ruled directly upon the federal question, relying upon its previous decision in *Douglas* v. *State*, 373 So.2d 895 (Fla. 1979) where it upheld the constitutionality of the override under the Fifth, Sixth, Eighth and Fourteenth Amendments, and again found no constitutional violation in the procedure (JA 48–49). Further, the court affirmed petitioner's death sentence: "We find the facts suggesting that the death sentence be imposed over the jury's recommendation of life, . . . meets the clear and convincing test to allow the override of the jury's recommendation in accordance with previous decisions of this Court." (JA 48). The question was again presented to the court by motion for rehearing requesting the court to reconsider its previous decisions holding that the jury override did not violate the Fifth, Sixth, Eighth and Fourteenth Amendments. The court denied rehearing (JA 52).

Petitioner timely filed in this Court his petition for a writ of certiorari which was granted on January 9, 1984 (JA 53).

SUMMARY OF ARGUMENT

1. This case is before the Court in precisely the same legal and factual posture as was *Beck* v. *Alabama*, 447 U.S. 625 (1980). Mr. Spaziano's jury, just as Mr. Beck's jury, was precluded by operation of law from considering any offenses less than capital homicide, though there was a reasonable basis in the evidence to support such lesser included offenses. *Beck* found such a situation to "introduce a level of uncertainty and unreliability into the factfinding process that cannot be tolerated in a capital case." *Id.* at 643. The dangers identified in *Beck* came to pass in this case. The jury, faced with an impossible two-option dilemma, had great difficulty reaching a verdict, doing so only after an *Allen* charge. This situation posed as great a threat to reliability as did the situation in *Beck*. More than in *Beck* the record shows that the evil it predicted actually occurred in this case. The jury issued an almost immediate life sentencing verdict under circumstances indicating that it was using that verdict as a safeguard against the result of its two-option dilemma. Accordingly, *Beck* controls this case and

mandates that Mr. Spaziano's death sentence be vacated. The fact that the source of the unreliability was a statute of limitations rather than an "express statutory provision" as characterized by the court below, does not make Mr. Spaziano's case more reliable or more constitutionally tolerable.

2. Whether analyzed under the Eighth Amendment, the Sixth Amendment or the Due Process Clause, Florida's jury override violates the Constitution. First, the objective indicia such as historical usage and legislative enactments compel two conclusions: (1) that juries, not judges, are best equipped to make reliable death decisions and (2) that a jury's decision for life is inviolate.

Second, the Court's independent judicial judgment should confirm the nearly universal legislative rejection of the jury override in capital cases. Death is different, in part, because it is a uniquely retributive punishment. Since the death penalty is society's expression of outrage at offensive conduct, the jury not the judge, is more likely to reliably place the offense and the offender on society's yardstick of moral outrage. Further, petitioner will demonstrate that the countervailing considerations are insufficient to justify the override procedure. Florida's override is based on no judgment, legislature or judicial, that such a procedure serves an important state interest; the override is rather a misguided attempt to comply with *Furman*. In addition, jury nullification, i.e., the jury's exercise of its power to bring in a verdict of acquittal in the teeth of both law and facts, is not a factor. By expressing its judgment to spare the life of a particular accused, the jury is not nullifying the law; it is performing precisely the function for which it was empaneled. Finally, while judges may bring a variety of professional skills to noncapital sentencing, those skills cannot substitute for a jury sitting as the "peers" of the accused. To the extent that the death decision is a decision whether to be retributive, it is the jury, not the judge, that has the "expertise." To the extent that the death decision involves findings of fact, *Bullington* v. *Missouri*, 451 U.S. 430 (1981) mandates that the jury's findings cannot be overridden.

3. The Florida standards governing the override of a jury's life verdict were, in this case, applied in a manner that denigrated the jury's consideration of mitigating factors and that was so vague and broad as to violate the constitutional requirement of reliability in death determinations. Petitioner's death sentence was the result of pincer-like constraints on the jury's ability to exercise its decision-making power in a rational and reasonable manner. On the one hand, the jury was deprived of the ability accurately to gauge the weight of the evidence against petitioner because of the failure to give the lesser included offenses. On the other hand, the jury's apparent attempt to proportion its verdict to petitioner's culpability at the sentencing phase was overriden by the judge.

Florida law holds that a jury's verdict for life cannot be overturned unless no reasonable basis exists for the verdict. But that standard was not applied here, because there was a reasonable basis for the jury's life verdict: the weakness of the evidence regarding petitioner's culpability. Reasonable people could and did disagree over the fate of Joseph Spaziano.

ARGUMENT

I

A DEATH SENTENCE IMPOSED AFTER A JURY VERDICT OF GUILT OF A CAPITAL OFFENSE, WHEN THE JURY WAS NOT PERMITTED TO CONSIDER A VERDICT OF GUILT OF LESSER INCLUDED OFFENSES THOUGH THE EVIDENCE WOULD HAVE SUPPORTED SUCH A VERDICT, VIOLATES THE EIGHTH AMENDMENT AND THE DUE PROCESS CLAUSE.

This case is before the Court in precisely the same factual and legal posture as was *Beck* v. *Alabama*, 447 U.S. 625 (1980). Mr. Spaziano's jury, just as Mr. Beck's jury, was precluded by operation of law from considering any offenses less than capital homicide, though there was a reasonable basis in the evidence to support such lesser-included offenses. The lack of this "third option" was found in *Beck* to "introduce a level of uncertainty and unreliability into the factfinding process that cannot be

tolerated in a capital case." *Id.* at 643. Those dangers identified in *Beck* plainly came to pass in this case. We will demonstrate that *Beck* controls to require Mr. Spaziano's death sentence be vacated, and that the state's statute of limitations does not excuse or make more constitutionally tolerable the uncertainty and unreliability interjected into Mr. Spaziano's trial.

A. Beck Requires Reversal Of Mr. Spaziano's Death Sentence

The offense in this case was alleged to have occurred between August 4 and August 22, 1973 (R 27). Two years and some three weeks later, an indictment was sought and returned, on September 12, 1975, charging Mr. Spaziano with first degree murder (JA 2-3). The three weeks beyond two years is important because the statute of limitations for noncapital offenses in Florida was two years and there was no limitation on capital offenses. § 932.465, *Fla. Stat.* (1973). Three weeks may seem to be a short period of time, but it made a great difference in Mr. Spaziano's trial. The timing of the indictment posed the question of jurisdiction on the lesser-included offenses of first degree murder. At the close of the evidence, Mr. Spaziano was given the choice of either waiving the applicable statute of limitations with respect to the lesser included noncapital offenses (attempted first degree murder, second degree murder, third degree murder and manslaughter)[2] or having the jury instructed only as to first degree murder (T 751-755). Mr. Spaziano declined the offer to

[2] Florida law is settled that the trial court must instruct the jury on all lesser included offenses. *E.g. Brown* v. *State*, 206 So.2d 377, 381 (Fla. 1968). In fact at the time of Mr. Spaziano's trial this requirement applied even if there was no evidence to support the lesser offenses. *Id.* That rule was changed effective October 1, 1981 to require instructions on lesser offenses only when supported by the evidence. *In re Florida Rules of Criminal Procedure*, 403 So.2d 979 (Fla. 1981).

waive the statute of limitations.[3] As a result, the jury was given only two options—guilty of first degree murder or acquittal.[4] The jury had a great deal of difficulty with these two options. Deliberations lasted more than six hours (T 808-820), were interrupted by judicial inquiry,[5] and were reported as deadlocked. The jury was then given the "*Allen* charge"[6] and only minutes later returned the verdict of guilt (T 820).

In *Beck*, the Court held that "the death penalty may not be imposed" where the jury is not permitted to consider a verdict of guilt of a lesser included non-capital offense where the evidence would support such a verdict. 447 U.S. at 627. The Court's holding applies equally to Mr. Spaziano's case. Draw-

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[3] In fact, there was a question at the time of Mr. Spaziano's trial whether a waiver of the statute of limitations would even be effective. *E.g. Tucker* v. *State*, 417 So.2d 1006, 1011 (Fla. 3d DCA 1982) ("[T]he issue of whether a defendant may waive the statute of limitations for purposes of conviction appears never to have been directly addressed in Florida, . . ."). The question arises because Florida considers the limitations to be a "jurisdictional" bar, and hence need not be pleaded in the trial court by the defendant and can be raised at any time. *E.g. Mead* v. *State*, 101 So.2d 373 (Fla. 1958); *State* v. *King*, 282 So.2d 162 (Fla. 1973); *Tucker* v. *State*, 417 So.2d at 1012; *id.* at 1014 (Pearson, J., concurring specially).

[4] As the jury was instructed: "There are only two verdict alternatives in this case. The alternatives are, not guilty, or, in the alternative, guilty of murder in the first degree as set out in the indictment." (T 805-806).

[5] As the hour grew late, the court inquired of the foreman: "if given more time is there a reasonable probability that the jury could agree on a verdict, it being the jury's function to do so." (T 815) About two hours later, the court called the jury out to inquire again whether it would be able to reach a verdict (T 817). The foreman replied: "At this point, Your Honor, I don't believe so." (T 817). The judge then gave the "jury deadlock" or "*Allen*" charge to the jury over defense objection.

[6] *Allen* v. *United States*, 164 U.S. 492 (1898).

ing upon its reasoning in *Keeble* v. *United States*, 412 U.S. 205 (1973), the Court reaffirmed the principle that "providing the jury with the 'third option' of convicting on a lesser included offense ensures that the jury will accord the full benefit of the reasonable-doubt standard." 447 U.S. at 635. This is so for while a jury should, "as a theoretical matter," return a verdict of acquittal where the prosecution has not established every element of the offense charged, the lack of lesser-included offense instructions creates the "substantial risk that the jury's practice will diverge from theory." 447 U.S. at 635 (quoting *Keeble*, 412 U.S. at 212). Theory diverges from practice because

> where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of *some* offense, the jury is likely to resolve its doubts in favor of conviction.

Id. Thus, *Keeble* held that an instruction on the lesser included offense was a critical procedural right that could not be denied to a federal criminal defendant. And *Beck* extended the *Keeble* reasoning to a state capital case and found that the lack of the "third option" so threatened the accuracy of the factfinding process that it could not be tolerated under the Constitution. The "procedural safeguard" of the instruction on lesser included offenses is especially important in a capital case for "death is a different kind of punishment", *Gardner* v. *Florida*, 430 U.S. 349, 357 (1977), and entails a "corresponding difference in the need for reliability." *Woodson* v. *North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion). Echoing the reasoning of *Keeble*, *Beck* found the lesser included option to be a constitutional imperative in a capital case:

> [w]hen the evidence unquestionably establishes that the defendant is guilty of a serious, violent offense—but leaves some doubt with respect to an element that would justify a conviction of a capital offense—the failure to give the jury the "third option" of convicting on a lesser in-

> cluded offense would seem inevitably to enhance the risk of an unwarranted conviction.
>
> Such a risk cannot be tolerated in a case in which the defendant's life is at stake.

Beck, 447 U.S. at 637.

"In the final analysis" precluding a jury's consideration of the third option "interjects irrelevant considerations into the factfinding process, diverting the jury's attention from the central issue of whether the State has satisfied its burden of proving beyond a reasonable doubt that the defendant is guilty of a capital crime." These irrelevant considerations "introduce a level of uncertainty and unreliability into the factfinding process that cannot be tolerated in a capital case." *Id.* at 642-643.

The risk of an unwarranted conviction of a capital offense came to pass in the present case in a manner that falls squarely within the four corners of *Beck*. Mr. Spaziano's jury, like Mr. Beck's, was faced with the predicament of having but two options in its guilt determination. That this predicament actually interjected itself into the jury's deliberation is shown by the difficulty the jury had in reaching a verdict, a verdict returned only after the "dynamite charge." Mr. Spaziano's jury was faced with what it was told was a very brutal offense, but with only flimsy evidence to support guilt of the capital offense. There was no direct evidence of the offense, no evidence as to the cause of death, the manner and means of death, or a motive for the death. In short, there was virtually *no* evidence as to the degree of homicide.

The state's case rested exclusively[7] upon the testimony of 16-year-old Tony Dilisio, who had no personal knowledge of the

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[7] As the prosecutor told the trial court during a motion to preclude Dilisio's testimony: "If we can't get in the testimony of Tony Dilisio, we'd absolutely have no case here whatsoever. . . . So either we're going to have it through Tony, or we're not going to have it at all." (T 614)

offense itself and related only what Mr. Spaziano purportedly told him and showed him at the scene weeks later, though he said he had never believed Mr. Spaziano (T 627-628). Moreover, Dilisio's credibility was placed in substantial doubt by a number of factors, including his motives to testify falsely, his tendency to "exaggerate" the truth, his admitted extensive drug use during relevant times, and the fact that he did not report what he had supposedly seen and only "recalled" the subject of his testimony after undergoing police hypnosis. Accordingly, there was *no* direct evidence of a premeditated homicide[8]—if, how, when, why it might have occurred—leaving just the indirect supposition evidence that was itself subject to considerable question.

Since there was no evidence as to the manner, means or motive of the death, there could certainly be a question of whether the state had met its burden of proving the intent required for the capital offense. For example, even taking the state's evidence at face value, the jury could have believed that the state had shown that Mr. Spaziano was somehow involved in or knew about the homicide and was thus culpable in that offense, but not believed that the state had met its burden of proving the essential element of premeditation.[9] This element could be in further doubt if the jury rejected even part of Dilisio's story. With evidence on the essential element of

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[8] Though in Florida a charge of first degree murder includes both premeditated and felony murder, *Knight* v. *State*, 338 So.2d 201 (Fla. 1976), Mr. Spaziano's jury was instructed only on the theory of premeditation (T 794-96).

[9] Evidence of premeditation cannot be left to "guesswork and speculation." *Weaver* v. *State*, 220 So.2d 53, 59 (Fla. 2d DCA 1969). "[I]n order to constitute murder in the first degree it must be established beyond every reasonable doubt, not only that the accused committed an act which resulted in the death of another human being, but it must be proven that before the commission of the act which results in death that the accused had formed in his mind a distinct and definite purpose to take the life of another human being

premeditation so lacking, a verdict of second degree murder ["evincing a depraved mind regardless of human life," § 782.04 (2), *Fla. Stat.* (1973)] would certainly have been reasonable. *See, e.g., Hall* v. *State*, 403 So.2d 1319 (Fla. 1981) (evidence showing that the defendant was involved in the killing, but not showing how the killing was actually accomplished, was insufficient to establish premeditation, but did support second degree murder.)[10] The evidence certainly could have supported a conviction for a lesser included offense. But the jury was not given that option.

More than in *Beck*, therefore, this case presents solid indications that the evil predicted by *Beck* actually occurred here. Mr. Spaziano's jury had obvious difficulty reaching a verdict. Its deliberations were interrupted several times by judicial inquiry—one time the judge reminded the jury that it was its "function to return a verdict" (T 815).[11] As the deliberations drew on, the judge called the jury out to ask whether it would be able to reach a verdict (the jury had not at that point reported a deadlock). The foreman said: "At this point, I don't

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and deliberated or meditated upon such purpose for a sufficient length of time to be conscious of a well defined purpose and intention to kill another human being, and if then in the execution of such purpose and design he kills another, his act is murder in the first degree." *Snipes* v. *State*, 154 Fla. 262, 17 So.2d 93, 97 (1944).

[10] It is also reasonable that a verdict of manslaughter could be returned under the residual aspect of that offense which is defined as: "The killing of a human being by the *act*, procurement or culpable negligence of another, in cases where such killing shall *not* be justifiable or excusable homicide nor *murder*, . . ." (emphasis supplied) *Fla.Stat.* § 782.07 (1973); *cf., Snipes* v. *State*, *supra* (where the court found insufficient evidence of premeditation and reduced the verdict to manslaughter, though it eventually decided to order a new trial because of "prejudice.").

[11] *See Jenkins* v. *United States*, 380 U.S. 445 (1965) (Finding coercive a judge's statement to the jury that "You have got to reach a decision in this case.")

believe so." (T 817). The judge responded by giving (over objection) the "*Allen*" or "dynamite" charge. Having been "dynamited," the jury returned a verdict within minutes (T 820).

The reliability of the guilt determination was plainly threatened further by the *Allen* charge. The jury was given only two options and was having great difficulty with its impossible dilemma. Poised in this impossible situation, however, the jury was then further pressured by the "*Allen*" charge.[12] "While it is, of course, impossible to gauge what part [the *Allen* charge] played in the jury's action of returning a verdict" within minutes after the charge, "this swift resolution of the issues in the face of positive indications of hopeless deadlock, at the very least give rise to serious questions in this regard." *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 462 (1978). There can be little doubt in this case of the "substantial risk that the jury's practice . . . diverge[d] from theory." *Keeble*, 412 U.S. at 212.

That risk is made even more evident by the jury's sentencing verdict. In contrast to the difficulty the jury had in reaching its guilty verdict, it reached an almost immediate sentencing verdict of life imprisonment. This verdict suggests strongly that the jury was attempting to use the life verdict as its only available safeguard against the overall weakness of the evidence. If it had believed the state's evidence, the jury would

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[12] The "*Allen* charge", though approved by the Court, has itself been subject to considerable criticism as threatening the reliability and independence of the jury's verdict. *See, e.g., United States* v. *Bailey*, 468 F.2d 652 (5th Cir. 1972), *aff'd en banc*, 480 F.2d 518 (5th Cir. 1973); *United States* v. *Fioravanti*, 412 F.2d 407 (3d Cir. 1969). Because of the threats to reliability posed by the "*Allen* charge" the modern trend is away from its use. *See generally* Annot., 97 A.L.R. 3d 96 (1980); Annot., 44 A.L.R. Fed. 468 (1979); Marcus, *Allen Instruction in Criminal Cases: Is the Dynamite Charge About to be Permanently Defused?* 43 Mo.L.Rev. 613 (1978); ABA Standards Relating to Trial by Jury, § 5.4 (1968).

have believed that Mr. Spaziano had committed a brutal crime.[13] The life verdict thus suggests strongly that the jury was concerned over the result of its two-option dilemma, and sought a "third option" through its sentencing verdict.

Accordingly, the record plainly shows that the threats to the reliability of the guilt determination were real. As determined by *Beck*, "the death penalty may not be imposed under these circumstances."

B. The Intolerable Uncertainty And Unreliability Is Not Excused By The Statute Of Limitations

As discussed in the preceeding section, the record reveals a constitutionally impermissible risk of an unwarranted conviction through the withholding from the jury of the third option of convicting Mr. Spaziano of a lesser included offense. The Supreme Court of Florida, however, sought to excuse that unconstitutionality and distinguish *Beck*, reasoning that rather than an "express statutory prohibition" as in *Beck*, the preclusion of the third option in this case arose from a separate statute of limitations. This difference, the Florida court believed, rendered constitutional his otherwise unconstitutional death sentence. (JA 22)

The Florida Supreme Court's attempted distinction of *Beck* must fail because the results are identical: here as in *Beck* there are serious risks of unreliability. Under the Florida court's reasoning, Mr. Spaziano could have had a constitutionally fair trial—without the intolerable risk of unreliability—if only the

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[13] As the Florida Supreme Court observed in reviewing a pre-*Furman* capital case where the jury had recommended mercy: "The deceased was killed by some assassin in cold blood, and if this defendant was in fact guilty of it there were no circumstances that called for or justified an extension of mercy, unless it was incorporated into the verdict as a safeguard against the prickings of the jurors' consciences. . . ." *Nims* v. *State*, 70 Fla. 530, 70 So. 565, 566 (1915); *accord Davis* v. *State*, 90 So.2d 629, 632 (Fla. 1956).

state had filed the indictment one month earlier. Since, however, the state filed the indictment three weeks after the statute of limitations had run as to the lesser offenses, the resulting two-option unreliability became tolerable. Such reasoning is unsatisfactory. The harm found in *Beck* is the harm of a distorted factfinding process at a time when the defendant's life is at stake. The factfinding does not become less distorted simply because the source of the denial of the third option is different.

The State of Florida certainly has an interest in administering its own statute of limitations. It is, however, purely a state policy decision which the State is free to change as it wishes. In fact the statute of limitations has now been amended in a manner that if applicable to Mr. Spaziano's case would not bar the lesser offenses.[14] Nevertheless, at the time of Mr. Spaziano's trial the State had chosen a two-year limitations period for all noncapital offenses. It had thus chosen, as state policy, that prosecution of all second degree murders, third degree murders, or manslaughters was barred if not undertaken within two years. Thus, if Mr. Spaziano were to receive a new trial with a jury properly instructed upon the lesser included offenses and the jury returned a verdict for a lesser offense, a legal determination by the judge that the statute of limitations barred adjudication would result not from *Beck*, but from the State's own policy choice. Mr. Spaziano would simply receive the benefit given by the statute of limitations to all others

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[14] Section 932.465, Florida Statutes (1973) was substantially amended and renumbered as *Fla. Stat.* § 775.15 (Supp. 1974), effective October 1, 1975. As amended there is no limitation on capital and life felonies, a four-year limitation on first degree felonies, and three years for all other felonies. Thus, if it had been applicable to Mr. Spaziano's trial, the statute would not have barred the lesser included offenses. It was, however, inapplicable because under Florida law it is the statute of limitations in effect at the time of offense that governs. *E.g. State ex rel Mauncy* v. *Wadsworth*, 293 So.2d 345 (Fla. 1974).

guilty of a like offense. As the Florida Supreme Court held, in a somewhat different context,[15] with regard to the statute of limitations:

> A jury has said this man is not guilty of murder in the first degree and, therefore, he is entitled to every benefit to which any one else can be entitled who is also only guilty of murder in the second degree. . . . [The State cannot] deprive him of the benefit of the statute of limitations while others guilty of the like offense may have the benefit of the statute of limitations. . . .

Mitchell v. *State*, 157 Fla. 121, 25 So.2d 73, 75 (1946). This reasoning also answers the question, should it be posed, as to why the defendant should not be forced to waive the statute of limitations in order to receive a fair trial in accord with *Beck*. As can be seen from *Mitchell*, that statute of limitations is considered a "substantive right" in Florida. *See also Lane* v. *State*, 337 So.2d 976 (Fla. 1976); *State* v. *King*, 282 So.2d 162 (Fla. 1973). And, a defendant cannot be required to waive a substantive right in order to receive a constitutionally fair trial. Thus, because a court may not have jurisdiction to adjudicate a defendant guilty of the lesser included offense is not of constitutional import. In fact, the Court's decision in *Keeble* did not depend upon whether the trial court had jurisdiction to adjudicate and sentence on the lesser offense. The question of jurisdiction on that lesser offense was not decided in *Keeble* and thus was not a part of its holding. *See United States* v. *John*, 437 U.S. 634, 636 n. 3 (1978); *Felicia* v. *United States*, 495 F.2d 353 (8th Cir. 1974).

The question as to whether a trial court may adjudicate a defendant convicted of a lesser included offense, is a separate legal decision that just be made by the trial court applying a

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[15] The Florida legislature had passed an amendment to the statute of limitations that excepted lesser included offenses from the limitations bar when a capital offense was charged. The Florida Supreme Court struck that statute as violative of equal protection on the reasoning quoted in the text.

separate analysis of state law. A number of legal questions can arise in applying a statute of limitations which are quite apart from the determination of the offense.[16] These decisions must be made by the judge and a judge cannot avoid those decisions simply by preventing a verdict from being rendered on a lesser included offense. As expressed in dissent by Justice Boyd in *Holloway* v. *State*, 379 So.2d 953 (Fla. 1980):

> The accused has a right to have the jury instructed on all less serious included offenses regardless of the expiration of the limitations period on the lesser offenses. The purpose of these instructions is to guide the jury in reaching the proper verdict and the running of the statute of limitations should have no effect.
>
> The function of the jury, in reaching the proper verdict, is to make factual and not legal determinations. If the jury finds that the conduct of the accused fits under a certain category of crime, it so informs the court in its verdict. The judge then decides the legal question of whether upon the verdict rendered an adjudication of guilt is proper. If the verdict finds the accused guilty of an offense barred by the statute of limitations, the court should acquit the defendant.

Id. at 954 (Boyd, J., dissenting from the dismissal of certiorari). These observations were echoed by Justice Blackmun in dissent from denial of certiorari in *Holloway:* "Whether the trial court properly may enter a judgment of guilt should the jury convict for a lesser included offense seems to me a separate *legal* matter with which the factfinder need have no concern." *Holloway* v. *Florida*, 449 U.S. 905, 908 (1980) (Blackmun, J., dissenting). *See also Spaziano* v. *Florida*, 454 U.S. ——, ——, 102 S.Ct. 581 (1981) (Marshall, J., dissenting).

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[16] For example, it must be determined whether the statute of limitations was tolled by some state action, *State* v. *Hickman*, 189 So.2d 254 (Fla. 2d DCA 1966), when the statute began to run in the case, *State* v. *King*, *supra*, the sufficiency of the allegations in the indictment, *Mitchell* v. *State*, 101 So.2d 373 (Fla. 1958), and the sufficiency of the evidence to show commission within the limitations period, *Ball* v. *State*, 204 So.2d 523 (Fla. 3d DCA 1967).

Moreover, establishing a different rule for a statute of limitations bar than for an express statutory bar, would create a painfully obvious opportunity for prosecutorial abuse. The mandate of *Beck* could be avoided by simply waiting to file an indictment until after the limitations period had run, thereby "mak[ing] it easier to convict" the defendant, *Keeble*, 412 U.S. at 212. It would permit a prosecutor to determine whether a defendant would receive a constitutionally reliable trial, simply by the timing of the filing of an indictment. Surely such a result cannot be logically defended.

Rather, a defendant charged with first degree murder should be entitled to a constitutionally reliable factfinding regardless of whether the statute of limitations has run as to the lesser included offense. A jury instructed on lesser included offenses that returns a verdict for such an offense would be doing precisely what a jury is supposed to do, determining if and what offense has been proven by State. A judge who determines later that adjudication is barred by the statute of limitations would be doing precisely what he should do, resolving legal questions. And if adjudication is barred, the defendant would receive precisely what was intended by the state in its statute of limitations. In short, the system would function precisely as it should. Such a procedure accommodates the interest of the defendant and society in assuring that the factfinding is accurate, and enforces the state policy with regard to its statute of limitations.

Accordingly, the record in this case stands as stark witness to the evil-come-true of *Beck*. The lower court decision must be reversed.

II

A TRIAL JUDGE'S OVERRIDE OF A JURY'S FACTUALLY BASED DECISION AGAINST THE DEATH PENALTY MUST, IN ALL CASES, VIOLATE THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS

A. The Jury Override Should Be Measured By The Evolving Standards Concerning The Imposition Of The Death Penalty

This case presents a narrow issue. The constitutionality of Florida's overall death penalty system is not in dispute here; relatively few death sentences in Florida or elsewhere are imposed as a result of an override of a jury life verdict.[17] Petitioner will demonstrate that, if a jury takes part in capital sentencing at all, its life verdict must be binding. To do so, we will discuss the reasons for involving a jury in the capital sentencing decision. Regardless of whether jury sentencing is required for capital sentencing, the question of jury inviolability is closely interwoven with the question of jury sentencing; many of the reasons for requiring a jury sentence in capital cases also counsel that a jury's verdict for life must be final.

Petitioner acknowledges that the Court has suggested that the power of a Florida judge to override a jury's life recommendation is constitutional. *Proffitt* v. *Florida*, 428 U.S. 242, 252 (1976); *Dobbert* v. *Florida*, 432 U.S. 282, 294-96 (1980); *Barclay* v. *Florida*, ___ U.S. ___, 103 S.Ct. 3418 (1983); *id.* at 3426-27 (Stevens and Powell, J.J., concurring). But the issue was not presented or briefed in any of those cases[18] and the

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[17] *See* notes 24, 25, and 26, and accompanying text, *infra*.

[18] In none of these cases was the constitutionality of the override procedure at issue. In *Proffitt*, both judge and jury recommended death, 428 U.S. at 246; the sole issue was whether the imposition of death in any case under the Florida statute violated the Constitution. *Id.* at 245; *see Gregg* v. *Georgia*, 428 U.S. 153, 202 n. 51 (1976) (noting the "limited grant of certiorari" in the five 1976 cases). In *Dobbert*,

Court's observations on the issue "though weighty and respectable, are nevertheless, dicta." *Duncan* v. *Louisiana*, 391 U.S. 145, 155 (1968). As made clear in *Duncan*, *Williams* v. *Florida*, 399 U.S. 78, 91, 93 (1970), and *Ballew* v. *Georgia*, 435 U.S. 223, 231 (1978) when the scope of the right to a jury is concerned dicta will not do.[19]

The Court's death penalty jurisprudence has developed in a dynamic manner because of the "obligation to re-examine capital sentencing procedures against evolving standards of procedural fairness in a civilized society." *Gardner* v. *Florida*, 430 U.S. 349, 358 (1977). In evaluating the constitutionality of a procedure for imposing the death penalty, the Court applies a two-part test derived from the proposition that the "[eighth] amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Gregg* v. *Georgia*, 428 U.S. 153, 173 (1976), (quoting *Trop* v. *Dulles*, 356 U.S. 86, 101 (1958)). First, the Court looks to contemporary values and public attitudes as manifested by objective indicia such as historical usage and legislative enact-

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the grant of certiorari was also limited and did not include this issue, 432 U.S. at 284; the Court held only that, given the presumed protections of *Tedder*, "defendants are not significantly disadvantaged vis-a-vis . . . the old statute" for purposes of the ex post facto clause. 432 U.S. at 296. In reaching the issue of the judge's consideration of nonstatutory factors in *Barclay*, the Court presumed but did not discuss the constitutionality of the override procedure. ___ U.S. at ___, 103 S.Ct. at 3420.

[19] It is settled that the Court does not resolve issues not raised on certiorari. *Mazer* v. *Stein*, 347 U.S. 201, 208 n.6 (1954). This rule applies with special force in the context of the jury issue. "Perhaps because the right to jury trial was not directly at stake, the Court's remarks . . . took no note of past or current developments regarding jury trials, did not consider its purposes and functions, [and] attempted no inquiry into how well it was performing its job . . ." *Duncan*, 391 U.S. at 155; *accord Ballew*, 435 U.S. at 231; *Williams*, 399 U.S. at 91, 93.

ments. Second, it makes an independent judicial assessment of the constitutionality of the practice in question. A challenged procedure must pass both parts of the Eighth Amendment test to be constitutional. The Court has used this two-step analysis to evaluate the constitutionality of the death penalty itself, *Gregg* v. *Georgia*, *supra*; of capital punishment for rape, *Coker* v. *Georgia*, 433 U.S. 584 (1977); of the death penalty for those who only aid and abet murder, *Enmund* v. *Florida*, ___ U.S. ___, 102 S.Ct. 3368 (1982); of mandatory death penalties, *Woodson* v. *North Carolina*, 428 U.S. 280 (1976); and of capital laws excluding lesser included offense charges. *Beck* v. *Alabama*, *supra*.

This approach under the eighth amendment is remarkably similar to the analysis applied in *Duncan* v. *Louisiana*, in evaluating whether the sixth amendment right to jury trial should be made binding on the states. The Court in *Duncan* first examined the history and prevailing practice of trial by jury in criminal cases. 391 U.S. at 151-154. *See also Baldwin* v. *New York*, 399 U.S. 66, 70-72 (1970). After reviewing such objective indicia, the Court then considered the "purposes and functions" of trial by jury and evaluated "how well [the jury] was performing its job." 391 U.S. at 155.

In determining whether the jury override procedure is constitutionally permissible, then, the Court must consider how that procedure has functioned in the actual context of the modern capital sentencing system. For

> it might be said that the limitation in question is not necessarily fundamental to fairness in every criminal system that might be imagined but is fundamental in the context of the criminal processes maintained by the American States.
>
> When the inquiry is approached in this way the question whether the States can impose [capital] punishment without granting a jury trial appears quite different from the way it appeared in the older cases . . .

Duncan, 391 U.S. at 149 n. 14.

The required analyses under the Eighth Amendment, the Sixth Amendment, and the Due Process Clause coalesce in this case. As we show below, they indicate that a judge may not override a jury's life sentence.

B. The Objective Indicia Are That Contemporary Values Hold A Jury's Life Sentence Inviolate

The indicia of the nation's judgment concerning who should decide who dies include "history and traditional usage, legislative enactments, and jury determinations." *Woodson* v. *North Carolina*, 428 U.S. at 289. Together, they dramatically compel two conclusions: (1) that juries, not judges, are best equipped to make reliable death decisions and (2) that a jury's decision for life is inviolate.

Since the mid-nineteenth century, American legislatures have decided with near unanimity that no person should be sentenced to die without the consent of his peers. Prior to *Furman* v. *Georgia*, "except for [f]our States that entirely abolished capital punishment in the middle of the last century, every American jurisdiction has at some time authorized jury sentencing in capital cases." *McGautha* v. *California*, 402 U.S. 183, 200 n. 11 (1971). The *Woodson* plurality traced this history:

> The inadequacy of distinguishing between murderers solely on the basis of legislative criteria narrowing the definition of the capital offense led the States to grant juries sentencing discretion in capital cases. Tennessee in 1838, followed by Alabama in 1841, and Louisiana in 1846, were the first states to abandon mandatory death sentences in favor of discretionary death penalty statutes.[20]

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[20] It is noteworthy that Tennessee instituted a binding life recommendation by the jury in 1838, made it nonbinding in 1858, and finally returned in 1919 to the original policy of finality which it maintains today (*see* Appendix C). *See also Gohlston* v. *State*, 43 Tenn. 126 (16 Thompson), 223 S.W. 839 (1920) (noting return to binding jury mercy power).

> This flexibility remedied the harshness of mandatory statutes by permitting the jury to respond to mitigating factors by withholding the death penalty. . . . By 1973, all of these remaining jurisdictions had replaced their automatic death penalty statutes with discretionary jury sentencing.

428 U.S. at 291-92. *See also Lockett* v. *Ohio*, 438 U.S. 586, 598-99 (1978); Bowers, *Executions In America* 7-9 (1974).

Thus, the majority of legislatures have made juries rather than judges the sentencer in capital cases. A much larger majority has determined that, when there is a jury, its decision for life is final. Indeed, the practice of overriding a jury's verdict in favor of life is contrary to the overwhelming national practice at least since 1948. At no time since 1948 have more than three American jurisdictions authorized the rejection of a jury's determination for mercy in a capital case.

Out of 42 jurisdictions (including the United States) with discretionary capital punishment for murder in 1948,[21] only New York, Delaware and Utah sanctioned the practice of jury override. By the time of *Furman* in 1972, only Delaware and Utah out of 41 capital murder jurisdictions permitted jury overrides (including the United States and the District of Columbia);[22] New York made a mercy decision by either the judge or the jury binding in 1963.[23]

Prior to *Furman* death sentences after jury mercy recommendations were only rarely imposed or executed. There were

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[21] *See Andres* v. *United States*, 333 U.S. 740, 767 (1948) (Frankfurter, J., concurring). Inadvertently, Justice Frankfurter listed New York as binding and New Mexico as nonbinding, *but see* New Mexico Acts of 1939, Ch. 49 (jury recommendation of life imprisonment in capital case binding).

[22] *See Witherspoon* v. *Illinois*, 391 U.S. 510, 525-527 and nn. 2-8 (1968) (Douglas, J., concurring). Both Utah and Delaware now make life imprisonment automatic unless the jury unanimously agrees on death. *See* Appendix C.

[23] *See People* v. *Fitzpatrick*, 308 N.Y.S.2d 18, 22 (1970).

no executions in Delaware after 1949. All seven Utah executions between 1948 and 1972 involved cases where the jury recommended death; in two other cases death sentences were affirmed by the Utah Supreme Court after jury life recommendations, but the defendants received executive clemency (*see* Appendix D for Utah cases). Commentators have also observed that under the pre-1963 New York law, trial judges almost "invariably" followed jury recommendations of mercy. *See* Togman, *The Two-Trial System in Capital Cases*, 39 N.Y.U.L. Rev. 50, 75 n. 171 (1964) (citing New York District Attorney's Association, *Memorandum and Draft Bill* (October 17, 1960)). Thus, at least since 1948, death sentences after jury decisions for life have been rare in legislative practice and rarer yet in application.

Of the 38 jurisdictions that have chosen to retain the death penalty since *Furman*, 30 require a penalty jury's consent for death. In five of the other states, the judge alone decides penalty. None of the jurisdictions that permitted the override of a jury life determination in 1948 have retained such a practice. New York ended it in 1963, and Utah and Delaware now provide for a life sentence unless all 12 jurors agree on death. In only three states does the jury make a non-binding recommendation: only Florida, Indiana and Alabama permit death sentences after jury decisions for life (*see* Appendix C). As of February 1984, only two death sentences after jury life determinations have been imposed under the Indiana statute, one of which has been affirmed.[24] Four have been imposed under the Alabama statute, but none have yet been affirmed.[25]

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[24] The Indiana Supreme Court affirmed the jury override in *Schiro* v. *State*, 451 N.E.2d 1047 (Ind. 1983). The second case is currently awaiting briefing in that court, *Jay Thompson* v. *State*, Indiana Supreme Court No. 882-S303 (Harrison County No. 81-S62, sentenced on March 18, 1982).

[25] The case of *Murry* v. *State* was affirmed on March 29, 1983 by the Alabama Court of Criminal Appeals (3 Div. No. 604), but is pending decision in the Alabama Supreme Court (No. 82-743). That court requested further briefing after oral argument in *Murry* on the

With but one exception, therefore, all of the affirmances of death sentences imposed over a jury's life verdict since *Furman* have been in Florida.[26]

The Florida practice is itself an historical anomaly. The jury recommendation of mercy in a capital case was final from 1872 to 1972; as explained below, the present override procedure is the result of confusion over *Furman's* requirements and not of dissatisfaction with jury discretion for mercy.[27]

Over the past 30 years, there has been a consistent national judgment of near uniform scope that a jury determination of life in a capital case must be absolutely final. Twenty-one states now make life imprisonment automatic if even one juror fails to agree for death (*see* Appendix C); some of these states (e.g. Georgia, Louisiana, Virginia) specifically authorize the jury to impose life regardless of the weight of the aggravating circumstances. By requiring only a simple majority, and by instructing the jury to return a verdict for death whenever it finds that statutory aggravating circumstances outweigh mitigating circumstances, the Florida practice depreciates the jury's role far more than the national practice has generally found necessary or acceptable.

The degree to which states have chosen jury sentencing and jury inviolability is dramatic. The timing also is significant. "Only after *Furman* v. *Georgia* did eight states opt for judge sentencing. Notably, it was also after *Furman* that ten states

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question of whether the override of a jury's life verdict violates the state constitution. The case of *Lindsey* v. *State*, was affirmed by the Court of Criminal Appeals on November 1, 1983 (1 Div. No. 483) and is awaiting briefing in the supreme court. The remaining two cases are pending in the Court of Criminal Appeals: *Neeley* v. *State*, 7 Div. No. 145; *Jones* v. *State*, 1 Div. No. 377.

[26] There have been 83 overrides in Florida. The Florida Supreme Court has affirmed 20 of these death sentences, but of the 20 only 13 remain on Death Row. *See* Appendix B.

[27] *See* § D(1), *infra*.

adopted mandatory death laws. The *Woodson* plurality did not consider this development an indication of contemporary standards, attributing it instead to an erroneous assumption by those states that mandatory death laws were the only way to comply with *Furman's* 'multi-opinioned decision.' The enactment of judge sentencing after *Furman* should be viewed the same way, especially since all eight states choosing it had for decades used juries in sentencing capital defendants." Gillers, *Deciding Who Dies*, 129 U. Pa.L. Rev. 1, 43-44 (1980). The same is true for the jury override.

Evolving contemporary standards have resulted in the removal of the "onus of inflicting capital punishment" from the trial judge and entrusted the life or death decision to the common sense judgment of the jury. *United States* v. *Jackson*, 390 U.S. 570, 576 n. 12 (1968). This involvement of the jury in capital sentencing reflects the "reluctance to entrust plenary power over the life . . . of the citizen to one judge or a group of judges . . .," *Duncan* v. *Louisiana*, 391 U.S. at 156, and evinces a recognition that capital sentencing "places the real direction of society in the hands of the governed . . . and not in . . . the government." Powell, *Jury Trial of Crimes*, 23 Wash. & Lee L. Rev. 1, 5 (1966). Like the lesser included offense charge, "while [this Court has] never held that a defendant is entitled to [the practice] as a matter of due process, the virtually universal acceptance of the [practice] in both state and federal courts establishes the value to the defendant of this procedural safeguard." *Beck* v. *Alabama*, 447 U.S. at 638.

C. Independent Judicial Judgment Confirms The Unacceptability Of The Jury Override

As noted in *Coker* v. *Georgia*, "the attitude of state legislatures and sentencing juries do not wholly determine this controversy, for the Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment." 433 U.S. at 598; *accord Enmund* v. *Florida*, ___ U.S. at ___, 102 S.Ct. at 3376; *Gregg* v. *Georgia*, 428 U.S. at 183.

Court's independent judgment should confirm the nearly universal legislative rejection of the jury override in death cases for several reasons.

The legislative shift from judge to jury sentencing, discussed above, occurred in response to two factors. The first was jury nullification. When death was mandatory for specified offenses, "jurors on occasion took the law into their own hands in cases which were willful, deliberate and premeditated in any view of that phrase, but which nevertheless were clearly inappropriate for the death penalty. In such cases they simply refused to convict of the capital offense." *McGautha* v. *California*, 402 U.S. at 200. *See also Woodson* v. *North Carolina*, 428 U.S. at 280-92. But there was another, more fundamental reason for the shift: state legislatures recognized that the nature of the death decision is different in quality from a sentence of a term of years and that this difference requires jury sentencing.[28]

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[28] There are several indications in the patterns of legislative determination that the life or death decision is fundamentally a jury decision. First, if the penalty jury is unable to agree on sentence, all but one of the thirty states that use juries require a life sentence. If there were not a strong interest in having the jury make death sentence decisions, one would expect more lawmakers to have given the power to the court following jury disagreement. Second, of the twenty-nine states that require a jury to agree before death may be imposed, twenty-five explicitly require unanimity. Statutes in the remaining four are not explicit, but none permit a nonunanimous jury to impose death. Third, this pattern occurs despite *Witherspoon's* holding that scrupled jurors may not be challenged for cause from the penalty panel and despite the consequent reduction in a state's ability to control the composition of the sentencing jury. After *Witherspoon*, there was no movement to reduce the unanimity requirement, as a dissenter had suggested, or to shift the penalty decision to judges. Fourth, juries have been retained even though it is no longer possible for a state to limit by operation of law the evidence the sentencer hears in mitigation of penalty. *See* Gillers, *supra*, at 16-19. *See also* appendix C.

Not only is death irrevocable, but the motives for its imposition differ from punishments of even life imprisonment. Rehabilitation, an important goal in noncapital sentencing, *see Williams* v. *New York*, 337 U.S. 241,248 (1949), is irrelevant here. Incapacitation has never been embraced by this Court as an objective of the death penalty, perhaps because imprisonment serves society's interest in removing potentially dangerous persons from our midst. *See* Gillers, *supra*, at 47. Deterrence is a matter of great importance to legislatures debating the death penalty, but not to particular sentencers deliberating whether the penalty should be imposed in a given case.[29] *Id.* at 49-53. Retribution stands as the primary motive impelling the sentencer's judgment that a particular defendant should die.

In *Gregg* v. *Georgia*, the Court reasoned that "capital punishment is an expression of society's outrage at particularly offensive conduct" and that "the decision that capital punishment may be the appropriate sanction in extreme cases is an expression of the community's belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death." 428 U.S. at 184; *see also Furman*, 408 U.S. at 308 (Stewart, J., concurring); *id.* at 394-95 (Burger, C.J., dissenting); *id.* at 452-54 (Powell, J., dissenting). The plurality quoted Lord Justice Demming's statement that:

> Punishment is the way in which society expresses its denunciation of wrong doing, and, in order to maintain respect for law, it is essential that the punishment inflicted for grave crimes should adequately reflect the revulsion felt by the great majority of citizens for them. It is a mistake to consider the objects of punishment as being deterrent or reformative or preventive and nothing else. . . . The truth is that some crimes are so outrageous that society insists on adequate punishment, because the

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[29] To decide to execute a particular defendant on the basis of general deterrence would violate the *Lockett* principle that death sentences must be individualized. *See* Gillers, *supra*, at 47-53.

> wrong-doer deserves it, irrespective of whether it is a deterrent or not.

Gregg, 428 U.S. at 184 n. 30.[30]

The Court's recent opinions reflect the centrality of the retributive justification for capital punishment.

> [T]his retributive justification requires that capital punishment be imposed only on those who are deserving of society's ultimate sanction. *See Zant* v. *Stephens*, 51 U.S.L.W. 4891, 4895 (1983) (in order to avoid constitutional invalidation, aggravating factors must "reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder"). Hence, the retributive nature of the capital sentence is reflected in the Supreme Court's frequently repeated concern . . . that the sentencer's focus be on the individual offender and his crime. *Lockett* v. *Ohio*, 438 U.S. 586, 602-05 (1978); *Woodson* v. *North Carolina*, 428 U.S. 280, 304 (1976). . . . The retributive justification for capital punishment requires that the sentencing decision turn in large part on considerations of the justice of imposing death on a given offender for committing a given crime. *See Zant* v. *Stephens*, 51 U.S.L.W. at 4895.

Tucker v. *Zant*, No. 83-8137, Slip op. at 4-5 (11th Cir. Jan. 20, 1984).

But if the decision whether to impose death in a particular case is essentially a retributive judgment, who is in the best

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[30] *See also* Stephen, *A General View of the Criminal Law of England* 99 (2d ed. 1890); van den Haag, *Punishing Criminals* 12-13 (1975); Berns, *For Capital Punishment*, 154-55 (1979); Packer, *The Limits of the Criminal Sanction* 43-44 (1968); Royal Commission on Capital Punishment, 1949-53, ¶ 52 (1953); Cohen, *Reason and Law* 50 (1950); Gardner, *The Renaissance of Retribution—An Examination of Doing Justice*, 1976 Wisc. L. Rev. 781,798; Greenwalt, *"Uncontrollable" Actions and the Eighth Amendment: Implications of Powell* v. *Texas*, 69 Colum.L.Rev. 927, 929 (1969); Goodhart, *English Law and the Moral Law* 93 (1953); Hart, *The Aims of the Criminal Law*, 23 L. & Contemp. Soc. Prob., 401 (1958). *Cf. Richmond Newspapers Inc.* v. *Virginia*, 448 U.S. 555, 572 (1980).

position to make that judgment, a judge or a jury? And what should we do when judge and jury disagree?[31] Resolution of both inquiries hinges on the relative reliability of the underlying determination that we ask the judge or jury to make.

Because the death decision is a retributive one and because retribution is an expression of the will of the community, a greater degree of reliability is achieved if the representatives of the community are heard from and followed. The kind of

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[31] The question is not a matter of merely theoretical importance. The two institutions disagree over death with some frequency. As of February 14, 1984, Florida trial judges have overridden jury verdicts of life in 83 cases, although only twenty have been affirmed and five of those were subsequently vacated on other grounds and two inmates died by suicide. *Post-Furman Death Sentences in Florida* (unpublished compilation prepared by Capital Punishment Project, University of Florida, Department of Sociology, Michael Radelet, Director) (copy available from counsel for petitioner) (*See* Appendix B). Florida's experience with its override makes clear that "we are not talking about alternative routes to the same destination." Gillers, *supra*, at 68.

The choice between judge and jury may matter in other ways as well. Two studies have concluded that Florida juries were less influenced by a capital defendant's race and socio-economic status than were judges:

> There was no evidence that characteristics of the defendant influenced the decisions made by the juries. However, many of these characteristics (sex, employment status, relationship to victim, and type of attorney) were related to the final decisions of the judges. In other words despite the juries' unbiased recommendations the judges imposed the death penalty in a manner that was biased against males and the unemployed.

Foley, *Florida After the Furman Decision: Discrimination in the Imposition of the Death Penalty* (unpublished paper at the University of North Florida) (copy available from counsel for petitioner) (quoted in Gillers, *supra*, at 68 n. 318). *See also* Radelet & Vandiver, *The Florida Supreme Court & Death Penalty Appeals*, 74 J. Crim. L. & Criminology 401 (1983).

reliability discussed by the Court in cases such as *Lockett* refers to the accuracy of the decision to be retributive.

The retributive nature of the death decision suggests that the jury is best equipped to make that determination and, when the two institutions disagree, that the errors are being made by the judges choosing death, not the juries choosing life. The life override is a classic example of the proposition that "when juries differ with the result at which the judge would have arrived, it is usually because they are serving some of the very purposes for which they were created and for which they are now employed." *Duncan* v. *Louisiana*, 391 U.S. at 157 (citing Kalven and Zeisel, *The American Jury* (1966)). The role of the jury in capital sentencing is to "maintain a link between contemporary community values and the penal system" that reflects the "evolving standards of decency that mark the progress of a maturing society." *Witherspoon* v. *Illinois*, 391 U.S. 510, 519 n. 15 (1968). The jury's job is to "introduce into the process a lay judgment, reflecting values generally held in the community concerning the kinds of potential harms that justify the state" in seeking a defendant's death. *Humphrey* v. *Cady*, 405 U.S. 504, 509 (1972).[32] That is a job that a jury can best perform.

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[32] The role of the jury as conscience of the community is perhaps most clear in a capital punishment scheme such as Florida's. The Florida Supreme Court has acknowledged repeatedly that the jury's decision on life or death "represent[s] the judgment of the community as to whether the death sentence is appropriate" in a given case. *McCampbell* v. *State*, 421 So.2d 1072, 1075 (Fla. 1982); *accord Richardson* v. *State*, 437 So.2d 1091, 1095 (Fla. 1983) (jury is "conscience of community"); *Quince* v. *State*, 414 So.2d 185, 187 (Fla. 1982) (quoting *Jones* v. *State*, 332 So.2d 615, 622 (Fla. 1976) (Sundberg, J., concurring)) ("jury represents the conscience and mores of the community in which the crime was committed"); *Odom* v. *State*, 403 So.2d 936, 942 (Fla. 1981) (advisory sentence "represents the judgment of the community as to whether the death penalty is appropriate"); *McCaskill* v. *State*, 344 So.2d 1276, 1280 (Fla. 1977) (juries are the "conscience of our communities").

It is important to note that the issue here is not "jury nullification", *i.e.*, the jury's exercise of its "power to bring in a verdict [of acquittal] in the teeth of both law and facts." *Horning* v. *District of Columbia*, 254 U.S. 135, 138 (1920) (opinion of Holmes, J.). By expressing its judgment to spare the life of a particular defendant, the jury is not "nullifying" the law it has sworn to uphold; it is performing precisely the function for which it was empaneled. Its very role within our capital sentencing scheme is to bespeak community sentiment by exercising its own judgment. The jury's response *is*, by definition, society's response.

It follows that juries

> are more likely to accurately express community values than are individual state trial judges. This is true because twelve people are more likely than one person to reflect public sentiment, because jurors are selected in a manner enhancing that likelihood and because trial judges collectively do not represent—by race, sex, or economic or social class—the communities from which they come. The response of a representative jury of acceptable size is consequently taken to be the community response. The jury does not try to determine what the community would say, but in giving its conclusion, speaks for the community. The judge, on the other hand, must either assess the community's "belief" or "conscience" and impose it or must impose his own and assume it is the community's. Whichever the judge does, the representative jury would seem to have a substantially better chance of identifying the community view simply by speaking its mind.

Gillers, *supra*, at 63-64.

The role of the jury as a reliable "index of contemporary values," *Gregg* v. *Georgia*, 428 U.S. at 182, is summed up in the Chief Justice's dissenting opinion in *Furman*. "Legislatures prescribe the category of crimes for which the death penalty should be available, and, acting as the 'conscience of the com-

munity' juries are entrusted to determine in individual cases that the ultimate punishment is warranted." 408 U.S. at 388.[33]

The Court's reasoning in applying the Sixth Amendment's jury trial right to the states also supports the conclusion that the jury should make the capital sentencing decision. In concluding the right to jury trial is a fundamental principle of our system of liberty and justice, the Court reasoned that "a right to jury trial is granted to criminal defendants in order to prevent oppression by the Government. . . . Providing an accused with the right to be tried by his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased or eccentric judge." *Duncan*, 391 U.S. at 155-57; *accord Ballew* v. *Georgia*, 435 U.S. at 229; *Williams* v. *Florida*, 399 U.S. at 100. Thus, "if the defendant preferred the commonsense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it. Beyond this, the jury trial

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[33] The retributive decision is crucial at two stages in the legal process of deciding who dies: an inquiry into retribution plays a role at the legislative definitional stage, when the issue is what classes of people *may* be put to death, and also at the capital sentencing stage, when the issue is who, of the class delineated by the legislature, *will* be put to death. The legislature, in debating whether to have a death penalty at all, will evaluate the possible retributive value of the penalty. But the legislature cannot, consistent with *Lockett*, *Woodson*, and *Gregg*, make a one-time determination that the death penalty does serve the interest in retribution and thereby bar the sentencer from considering the matter. The capital sentencer, which, like the legislature, must also be a medium of public attitudes toward the death penalty, must apply those attitudes in every given case. The sentencer in a capital case performs the crucial function of assessing whether *that case* presents circumstances that, although not enumerated in the statutes' list of mitigating factors, nevertheless makes death an inappropriate penalty. *Lockett's* requirements, by demanding that a sentencer consider all mitigating circumstances proffered, thus ensures that an individual death sentence is consistent with evolving standards of decency in our culture.

processes in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power—the reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges." *Duncan*, 391 U.S. at 157.

The reasoning in *Duncan* makes clear that the central function of the jury as a bulwark between the accused and the state is particularly important in death cases. The "inquiry must focus upon the function served by the jury in contemporary society." *Apodaca* v. *Oregon*, 406 U.S. 404, 411 (1972). "[T]he essential feature of a jury obviously lies in the interposition between the accused and his accuser of the common-sense judgment of a group of laymen." *Apodaca* v. *Oregon*, 406 U.S. at 411 (quoting *Williams* v. *Florida*, 399 U.S. at 100).

One commentator has persuasively argued that the reasoning of *Duncan*

> applies with greater force to the search for reliability in death sentencing. In death sentencing, unlike traditional factfinding, there are no advantages to giving the responsibility to the trial judge. In factfinding, the Court has acknowledged that a trial judge may be more "tutored" than a panel of lay persons, that is, more able to assess credibility, put lawyers' arguments in perspective and apply the law to the facts. Despite these possible advantages, a defendant is entitled to a jury sentence for the reasons given in *Duncan* and *Williams*. The sole function of the capital sentencing tribunal is to place the offender and the offense on the scale of the community desire for retribution. Adjusting this delicate balance gains nothing from the trial judge's expertise in finding facts and applying law, but would profit from the "common-sense judgment" and "community participation" of a representative jury of adequate size.
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> *Duncan* also provided "negative" reasons for imposing a right to jury trial on the states. It told us that judges can be "compliant, biased or eccentric." These risks do not disappear at death sentence proceedings. Furthermore, *Duncan's* reference to the "fear of unchecked power,"

> which has made us "reluctant" to give "a group of judges" complete control over factfinding where "life and liberty" are at stake, holds persuasively at capital sentencing, where life, death and the community will must be reconciled. In short, the dangers that *Duncan* saw in judicial control of guilt determination speak clearly to *Lockett's* wish for reliability in death sentencing.

Gillers, *supra*, at 66-67.

The Court has often considered the weight of scholarly authority in evaluating procedures concerning jury and death penalty practices. *See, e.g., Gregg* v. *Georgia*, 428 U.S. at 189-95. The consensus among scholars is that a jury's verdict for life should be binding. Although the *Proffitt* plurality cited sources to show that trial judges can play a useful role in capital sentencing, 428 U.S. at 252 n.10, a survey of the literature reveals considerable agreement that jury participation is highly desirable, if not mandated, in capital sentencing.[34] Both sources cited by the Court in *Proffitt* note with approval the prevailing practice of requiring a jury's consent for death sentences but leaving noncapital sentencing to experienced judges alone.[35] Several additional sources, including the Model Penal

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[34] *See* Liebman and Shepard, *Guiding Capital Sentencing Discretion Beyond the "Boiler Plate:" Mental Disorder as a Mitigating Factor*, 66 Geo.L.J. 757, 819 n.273 (1978) (jury is appropriate, if not constitutionally mandated, capital sentencing forum); Manneheim, *The Capital Punishment Cases: A Criticism of Judicial Method*, 12 Loy.L.Rev. 85, 107-108, 131 (1978) (suggests requirement of jury consent for death in penalty phase under the Constitution); Gillers, *Deciding Who Dies*, 129 U. Penn.L.Rev. 1, 39-74 (1980) (jury consent for death constitutionally required).

[35] *See* American Bar Association Project on Standards for Criminal Sentencing, *Sentencing Alternatives and Procedures*, § 1.1, Commentary 47-48 (Approved Draft 1968) (giving reasons for requiring jury consent for death penalty); President's Commission on Law Enforcement and Administration of Justice: The Challenge of Crime in a Free Society Task Force Report, *The Courts* 26 (capital jury discretion generally accepted, but noncapital jury sentencing undesirable).

Code, endorse a system where the trial judge is the final sentencer but where an advisory jury's recommendation for life is binding.[36] One commentator, who compared several post-*Furman* systems, generally endorsed Florida's statute and case law but disapproved of the tension created between judge and jury when a jury's decision for life can be disregarded.[37] Even severe critics of noncapital jury sentencing have advocated the jury's power to reject the death penalty.[38]

D. The Countervailing Considerations Are Insufficient To Justify The Override Procedure

Petitioner's position may be challenged on three grounds. First, Florida may have a compelling need for employing this unique procedural device. Second, there is the potential problem of jury nullification. Third, as the Court suggested in *Proffitt* v. *Florida*, judges' professional training and experience may make them better capital sentencers. As shown below, none of these countervailing considerations justify the override procedure.

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[36] American Law Institute, *Model Penal Code* 210.6 and Commentary at 133 (Prop.Off.Draft 1962); *Togman, supra*, 39 N.Y.U.L. Rev. at 53; Wollan, *The Death Penalty After Furman*, 1974 Crim. Justice Systems Rev. 213, 230; *Symposium on Capital Punishment*, 7 N.Y.L. Forum 249, 313 (1961) (opinion of Prof. Louis B. Schwartz); Comment, *Jury Discretion and the Unitary Trial Procedure in Capital Cases*, 26 Ark.L.Rev. 33, 52-53 (1972).

[37] Shipiro, *First Degree Murder Statutes and Capital Sentencing Procedures: An Analysis and Comparison of Statutory Systems for the Imposition of the Death Penalty in Georgia, Florida, Texas and Louisiana*, 24 Loy.L.Rev. 709, 736, 743-747 (1978).

[38] *See, e.g.*, Note, *Jury Sentencing in Virginia*, 53 Va.L.Rev. 968, 969 (1967); Rubin, *The Law of Criminal Correction* 375 (1973). LaFont, *Assessment of Punishment—A Judge or Jury Function*, 38 Texas L.Rev. 834, 838 (1960); *Report of the Royal Commission on Capital Punishment*, 1949-1953, ¶ 571.

1. Florida did not have a compelling reason for the override procedure

Florida's override in favor of death is based on no judgment, legislative or judicial, that such a procedure serves an important state interest. Rather, the override's only justification was the state's misapprehension that this device is required by *Furman*. *Furman* "[p]redictably engendered confusion as to what was required in order to impose the death penalty in accord with the Eighth Amendment." *Lockett* v. *Ohio*, 438 U.S. at 600. Like the procedures at issue in *Woodson* and *Beck*, Florida's override was passed in "direct response to *Furman*," 438 U.S. at 600 n.7, and was a misguided attempt to "retain the death penalty in a form consistent with the Constitution." *Woodson*, 428 U.S. at 298.

In 1872, Florida entrusted its juries with the decision on death. There it remained until *Furman* in 1972. At the time of *Furman*, Florida was in the process of amending its 1872 law. *Furman* intervened and generated much confusion within the Florida political system.[39] The two houses of the Florida legislature divided sharply on the proper response to *Furman*. The Florida Senate believed that *Furman* required jury consideration of statutorily enumerated aggravating and mitigating circumstances. The jury would then, by majority vote, render an advisory opinion of whether death should be imposed; a verdict for life would be binding but a verdict for death advisory. *See* Ehrhardt and Levinson, *Florida's Legislative Response to Furman: An Exercise in Futility?* 64 J. Crim. L.

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[39] The Florida legislature responded to *Furman* by enacting its new statute in a matter of days at a Special Session in December 1972. The act was approved by the Governor on December 8 and took effect immediately. Florida thus became the first state to enact a post-*Furman* death penalty statute. *See* Note, *Florida's Legislative and Judicial Responses to Furman* v. *Georgia: An Analysis and Criticism*, 2 Fla.St.L.Rev. 108, 126 (1974); *see also* Radelet and Vandiver, *The Florida Supreme Court and Death Penalty Appeals*, 74 J. Crim. L. and Criminology 401, 402 (1983).

and Criminology 10, 15 (1973). The Governor, Attorney General and State House of Representatives, however, read *Furman* differently. According to the House bill, the jury would be excluded from the penalty phase altogether. *See* Ehrhardt & Levinson, *supra*, at 15.

The resulting statute, formulated by a conference committee, was a compromise between the House bill and the Senate's proposal:

> Because neither the House nor the Senate would retreat from its stance on the procedure and composition of the sentencing proceeding contained in the bill passed by each, a conference committee was necessary to resolve the differences. The statute finally approved is a hybrid: in return for the House's approval of a judge and jury sentencing procedure, the Senate abandoned its insistence that the jury have a determinative role in sentencing in capital cases. While the statute retains the Senate's philosophy that the jury should participate in the sentencing process, the jury now has the authority only to give an advisory sentence which can then be rejected by the trial judge if his findings regarding mitigating and aggravating circumstances justify such action.

Ehrhardt & Levinson, *supra* at 16.

The Florida Supreme Court's approval of the override has been based on the same misconception of *Furman's* requirements. In the decision below the Supreme Court of Florida said that "allowing the jury's recommendation to be binding would violate *Furman*." *Spaziano* v. *State*, 433 So.2d 508, 512 (Fla. 1983); JA 49; *accord Johnson* v. *State*, 393 So.2d 1069, 1074 (Fla. 1981); *Douglas* v. *State*, 373 So.2d 895, 897 (Fla. 1979). But "[n]othing in any of our cases suggests that the decision to afford an individual defendant mercy violates the Constitution." *Gregg*, 428 U.S. at 199. *Furman* invalidated the prior capital sentencing schemes because they gave the sentencer unbridled discretion to impose *death*,[40] not because it gave the jury discretion to extend mercy.

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[40] *See Anderson* v. *Florida*, 408 U.S. 938 (1972); *Pitts* v. *Wainwright*, 408 U.S. 491 (1972); *Boykin* v. *Florida*, 408 U.S. 940 (1972);

The legislative history and judicial construction of the override show that the state's decision to employ this curious procedural device was made solely[41] in an attempt to "retain the death penalty in a form consistent with the Constitution," *Woodson*, 428 U.S. at 298, rather than a legislative judgment that judges will render more reliable capital sentences. The Florida legislature, confronted with *Furman's* statement that unbridled jury discretion violated the Constitution and *McGautha's* statement that the formulation of standards to guide juries was impossible, reasonably believed that its override was constitutionally required.

2. Jury nullification is not a factor

Jury nullification occurs when a jury acts to acquit a defendant whom an omniscient observer would say was guilty beyond

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Brown v. *Florida*, 408 U.S. 938 (1972); *Hawkins* v. *Wainwright*, 408 U.S. 941 (1972); *Johnson* v. *Florida*, 408 U.S. 939 (1972); *Paramore* v. *Florida*, 408 U.S. 935 (1972); *Thomas* v. *Florida*, 408 U.S. 935 (1972); *Williams* v. *Wainwright*, 408 U.S. 941 (1972); *Anderson* v. *State*, 267 So.2d 8 (Fla.1972); *Chaney* v. *State*, 267 So.2d 65 (Fla.1972); *Reed* v. *State*, 267 So.2d 70 (Fla.1972); *In re Baker*, 267 So.2d 331 (Fla.1972); *Newman* v. *Wainwright*, 464 F.2d 615 (5th Cir. 1972); *Adderly* v. *Wainwright*, 272 F.Supp. 530 (M.D. Fla. 1972).

[41] Ironically, in *State* v. *Dixon*, 283 So.2d 1 (Fla.1973), the seminal case in which the Florida Supreme Court held its death penalty constitutional, the court justified the override in this way:

> The third step added to the process of prosecution for capital crimes is that the trial judge actually determines the sentence to be imposed—guided by, but not bound by, the findings of the jury. To a layman, no capital crime might appear to be less than heinous, but a trial judge with experience in the facts of criminality possesses the requisite knowledge to balance the facts of the case against the standard criminal activity which can only be developed by involvement with the trials of numerous defendants. Thus the inflamed emotions of jurors can no longer sentence a man to die; the sentence is viewed in the light of judicial experience.

Id. at 8.

a reasonable doubt; the jury nullifies the law, and a factually "guilty" defendant is acquitted. But the decision on death is quite different:

> Jury nullification, of course, goes to the question of whether a defendant will, on the one hand, be found guilty and be punished according to the strict dictates of the law, or, on the other, be forever free from any legal consequences of his criminal act. By marked contrast, when a jury declines to impose the death penalty upon one already convicted of a capital crime, the jury's exercise of community conscience and norms ordinarily will not result in the defendant being set free. In Mississippi, for example, the jury's sentencing alternatives for a capital offense are limited solely to capital punishment and life imprisonment.

Washington v. *Watkins*, 655 F.2d 1346, 1374 n.54 (5th Cir. 1981). In short, jury nullification results in the release of a "guilty" person. In Florida a binding life verdict would mean that the defendant will be incapacitated for a *minimum* of 25 years without parole.

More fundamentally, as discussed above, the jury, by reflecting the mores and values of the community in deciding who should die, is *following* the law. In a capital sentencing scheme such as Florida's, the jury's primary role is to place the defendant and his crime on the yardstick of community outrage.

3. The insufficiency of judicial expertise in capital sentencing

One may accept the general proposition that jury sentencing is required to ascertain the "conscience of the community" and still argue that judicial sentencing is needed to foster consistency among cases. In *Proffitt* v. *Florida*, the Court observed that "judicial sentencing should lead to greater consistency . . . since a trial judge is more experienced in sentencing than a jury, and therefore is better able to impose sentences similar to those imposed in analogous cases." 428 U.S. at 252. But while judges may bring a variety of professional skills

to sentencing, those skills cannot substitute for a jury sitting as the "peers" of the accused.

Noncapital sentencing involves factors and considerations better understood by judges. For example, lay jurors would probably not be aware of the availability of rehabilitative resources in the jurisdiction, conditions in the prisons, the likelihood of recidivism for the given offense, or the competence of local parole officials. "Most of these sentencing considerations do not arise in the death penalty decision, and so the judge's greater knowledge and experience are not called upon." Gillers, *supra* at 57. But more importantly, "there is no way for a judge to equal what a jury can best bring to the capital sentencing process—the community's view." *Id.* at 57-58. This is the key to the retribution inquiry, and here it is the jury, more than the judge, that has the "expertise."

The concern with "individualization" expressed in *Lockett* and *Eddings* also renders questionable the theoretical relevance of "analogous" cases at the sentencing stage. *Lockett* emphasizes the differences between people, their "uniqueness," 438 U.S. at 605, when it comes to capital sentencing.

Judges, moreover, may not have expertise that would in fact materially promote consistency in capital sentencing. Whatever expertise judges may have in noncapital sentencing is derived from their substantial experience in performing that function. But capital cases in any one jurisdiction are relatively rare; the actual number of capital cases that any one judge may sit on will be yet smaller. Thus, the ordinary predicates that provide expertise and thus greater consistency in sentencing—frequency and experience—are lacking in capital sentencing.

Moreover, judicial sentencing itself has been criticized for its high degree of inconsistency; the recent trend is to replace the discretion of sentencing judges with specific guidelines and more limited options for terms of imprisonment. *See generally* ABA Minimum Standards in Sentencing § 3.1 et seq.; Hoffman & Meierhober, *Application of Guidelines of Sentencing*, 3 L.

and Psyh. Rev. 53 (1977); Partridge & Eldridge, *The Second Circuit Sentencing Study: A Report to the Judges of the Second Circuit* (Wash. D.C., Federal Judicial Center 1974); Fla. R. Crim. P. 3.701, 3.988. To the extent similar defendants will be sentenced by different trial judges, the judges will predictably apply different standards in capital cases just as they do now in noncapital cases.

Finally, it might be argued that a capital sentencing determination is more than simply a decision regarding retribution. The sentencer also makes findings of facts, and judges may have greater expertise in factfinding that justifies the corrective device of jury override. But such an argument would squarely conflict with *Bullington* v. *Missouri*, 451 U.S. 430 (1981).

Robert Bullington was initially sentenced by a jury to life imprisonment; following reversal of his sentence by the state appellate court, the prosecutor attempted to again seek the death penalty. The Court held that because the first proceeding resembled a trial on guilt or innocence and because the state had involved a jury in that proceeding, the jury's determination for life was an "acquittal" for double jeopardy purposes. Although prior cases had declined to extend double jeopardy protections to sentencing, the similarity of the procedural structure of *capital* sentencing to those found at a trial on guilt or innocence mandated a different conclusion. 451 U.S. at 439.

Every major feature of the Missouri penalty trial relied on in *Bullington* is also present under the Florida procedure: the clear-cut choice between only two sentencing alternatives; the requirement that the jury base its choice upon the evidence, guided by detailed legal standards; the requirement that the state prove the proffered aggravating circumstances beyond a reasonable doubt; the presentation of evidence by both sides; opening and closing arguments by counsel; jury deliberations; and a formal verdict. *Compare Bullington*, 451 U.S. at 438 & n. 10, *with* § 921.141(1) & (2), Florida Statutes; Florida Rule of

Criminal Procedure 3.780; *State* v. *Dixon*, 283 So.2d 1, 9 (Fla. 1973).

The chief distinction between *Bullington* and the Florida procedure is that a Missouri jury's life decision is made binding by statute while a Florida's jury verdict for life imprisonment is denominated "advisory." But the language and reasoning of *Bullington* suggest that this distinction cannot control. Under Florida law, the state is required to present its factual case on sentencing in a jury proceeding that has all the indicia of a trial. But if it fails, it gets a second bite at the apple before the judge; indeed, it is free to adduce additional information in the form of a pre-sentence report, as occurred in this case. *But cf. Presnell* v. *Georgia*, 439 U.S. 14 (1978). "By enacting a capital sentencing procedure that resembles a trial on the issue of guilt or innocence, however, [Florida] *explicitly requires* the jury to determine whether the prosecution has 'proved' its case.' " *Bullington*, 451 U.S. at 444 (emphasis in original); *see* § 921.141(2) & (3), Florida Statutes.

The mitigating and aggravating circumstances listed in the Florida statute are questions of fact. *See Ford* v. *Strickland*, 696 F.2d 804, 876 (11th Cir. 1983) (Anderson, J., dissenting). Whether a crime was committed for pecuniary gain; whether a defendant was under sentence of imprisonment; whether a defendant was previously convicted of a felony; whether a defendant knowingly created a risk of death to many persons; whether a defendant has a significant history of prior criminal activity; whether the capital felony was committed while the defendant was under the influence of extreme mental or emotional distress; or whether the defendant's capacity to appreciate the criminality of or to control his conduct was impaired. These are all facts, and indeed are facts similar to factfindings traditionally made by juries at trials on guilt. The life or death decision depends on the existence or nonexistence of these facts. *Bullington* requires that a jury's findings of these facts must be deemed final.

In summary, the jury override procedure is constitutionally unacceptable. To the extent that the death decision is a deci-

sion whether to be retributive, the jury's verdict for life should be final. To the extent that the death decision involves findings of fact, *Bullington* mandates that the jury's findings cannot be overridden.

III

THE FLORIDA STANDARDS FOR THE OVERRIDE OF A JURY'S LIFE VERDICT ARE APPLIED IN A MANNER THAT DISCOUNTS THE JURY'S CONSIDERATION OF MITIGATING FACTORS AND THAT IS SO BROAD AND VAGUE AS TO VIOLATE THE CONSTITUTIONAL REQUIREMENT OF RELIABILITY IN THE DETERMINATION THAT DEATH IS THE APPROPRIATE PUNISHMENT IN A PARTICULAR CASE.

Petitioner's death sentence was the result of pincer-like constraints on the jury's ability to exercise its decision-making power in a reasonable and rational manner. On one hand, the jury was deprived of the ability accurately to gauge the weight of the evidence against petitioner because of the failure to charge the lesser included offenses. On the other hand, the jury's apparent attempt to proportion its verdict to petitioner's culpability at the sentencing phase was overridden by the judge.

Separately and together, these errors violated the Constitution. Together, they deprived this sentencing decision of any semblance of the reliability required by the Constitution. *See Zant* v. *Stephens*, ___ U.S. at ___, 103 S.Ct. at 2747. As set out in Point I, the failure to charge the lesser included offenses created the same risk of unreliability in the guilt determination that the Court found unacceptable in *Beck* v. *Alabama*, *supra*. As shown below, the application of the Florida override standards intensified this risk at the penalty phase, in violation of established constitutional requirements.

As articulated in *Tedder* v. *State*, 322 So.2d 908 (Fla. 1975), the Florida override standard focuses only on the reasons for imposing death: that "the facts *suggesting a sentence of death* should be so clear and convincing that virtually no reasonable

person could differ. . . ." *Id.* at 910 (emphasis added). But the Constitution requires that the jury be entitled to weigh matters reasonably relevant to mitigation. A jury override standard that does not take that weighing into account is constitutionally infirm under *Lockett*, 438 U.S. at 601 (quoting *Woodson* v. *North Carolina*, 428 U.S. 280, 304 (1976)).

Consider the application of the *Tedder* standard in this case: The Florida Supreme Court found that "the facts suggesting that the death sentence be imposed over the jury's recommendation of life . . . meets the clear and convincing test . . ." of *Tedder*. 433 So.2d at 511; JA 48. But the jury's determination cannot be overridden solely on the basis of "the facts suggesting that the death sentence be imposed," *id.*, when "[a] jury must be allowed to consider on the basis of all relevant evidence not only why a death sentence should be imposed, but also why it should not be imposed." *Jurek* v. *Texas*, 428 U.S. 262, 271 (1976).

The weakness of the evidence against petitioner, particularly with regard to the critical questions of culpability—*i.e.*, the degree of his involvement and the level of his intent—is a relevant factor that the jury can consider as a reason "why [the death penalty] should not be imposed." *Id.*[42] *See California* v. *Ramos*, ___ U.S. ___, 103 S.Ct. 3446, 3456 (1983) ("the jury . . . is free to consider a myriad of factors to determine whether death is the appropriate punishment"). This is particularly true in this case, where the jury was not allowed to resolve at the guilt phase any reasonable doubts that it may have had about the degree of petitioner's culpability.

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[42] *See* American Law Institute, Model Penal Code § 201.6(1)(f) (Proposed Official Draft 1962) (quoted in *McGautha* v. *California*, 402 U.S. at 223); Royal Commission on Capital Punishment 1949-53 ¶ 39, p.12 (1953); *Blankenship* v. *State*, 308 S.E.2d 369, 371 (Ga. 1983); *Smith* v. *Balkcom*, 660 F.2d 573, 580-81 (5th Cir. 1981), *modified*, 671 F.2d 858 (5th Cir. 1982). *Cf. Green* v. *Georgia*, 442 U.S. 95, 98 (1979).

It is not a sufficient answer to say that whatever mitigating concerns the jury may have had were outweighed by the strength of the aggravating factors. First, the Florida Supreme Court made no finding concerning the relative weight of the aggravating and mitigating factors in this case. Rather, it affirmed the override because the aggravating factors alone were "clear and convincing." *Spaziano*, 433 So.2d at 511; JA 48. Thus, half of what the jury was to weigh was reevaluated by the Florida Supreme Court, the other half was ignored. But even if the Florida Supreme Court had reweighed the aggravating and mitigating factors, that would not have been a sufficient basis to override the jury's verdict. The Florida statute requires "separate determinations," first, that at least one statutory aggravating circumstance exists beyond a reasonable doubt, second, "that the existing statutory aggravating circumstances are not outweighed by statutory mitigating circumstances" and third, "that death is the appropriate penalty. . . ." *Barclay*, ___ U.S. at ___, 103 S.Ct. at 3430 (Stevens & Powell, JJ., concurring). It is "entirely possible" that the sentencer might "yet feel that a comparison of the totality of the aggravating factors with the totality of the mitigating factors leaves it in doubt as to the proper penalty." *Smith* v. *North Carolina*, ___ U.S. ___, 103 S.Ct. 474, 474-75 (1982) (Stevens, J., opinion respecting the denial of certiorari). The record indicates that this jury had few doubts about the proper penalty; it returned a life sentence after only brief deliberation. By ignoring the jury's reasonable mitigating concerns, the override failed to "assure[ ] reliability in the determination that 'death is the appropriate punishment in [the] specific case.' " *Id.* (quoting *Lockett*, 438 U.S. at 601).

Perhaps at first blush, the *Tedder* standard may seem similar to that for a directed verdict or a judgment notwithstanding the verdict. *See* Fed.R.Civ.P. 50; *but compare* Fed.R. Crim.P. 29(c) (providing for motion for judgment of acquittal only). But it is not. The standard for a judgment notwithstanding the verdict is whether a jury could reasonably have decided as it did, given the evidence before it and the logical inferences

arising from that evidence. The life or death decision is different because it is not exclusively a factual question. This jury answered "no" to the constitutionally relevant question: whether the defendant deserves to die, a determination properly informed by the values and mores of the community as best expressed by the jury's verdict. Yet, Florida permitted the verdict to be overridden without consideration of the reasonableness of *that* determination, simply on the basis of the aggravating facts alone.

If an override of a jury's life verdict is ever constitutional, it may only be pursuant to a standard which recognizes—as Florida has done in its recent cases—"that a jury's advisory opinion is entitled to great weight, reflecting as it does the conscience of the community, and should not be overruled unless no reasonable basis exists for the opinion." *Richardson* v. *State*, 437 So.2d 1091, 1095 (Fla. 1983). This standard gives full weight both to the jury's consideration of mitigating factors and to its assessment of the appropriateness of the death penalty in light of contemporary community values.

The *Richardson* standard, moreover, highlights another constitutional infirmity of *Tedder* as applied in this case: "[I]f a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty. . . ." *Godfrey* v. *Georgia*, 446 U.S. 420, 428 (1980). A finding that "virtually no reasonable person could differ" with the imposition of the death penalty in a given case, *Tedder*, 332 So.2d at 910, is inherently subjective and unreliable.

"[R]easonable persons can differ over the fate of every criminal defendant in every death penalty case." *Spinkellink* v. *Wainwright*, 578 F.2d 582, 605 (5th Cir. 1978). In every jury override case a judge and a jury of twelve men and women have in fact disagreed on the appropriateness of the death penalty. And in more than half of the cases in which the Florida Supreme Court has affirmed a trial judge's override of a jury life

verdict, at least one Justice has dissented.[43] And in almost every one of those cases there was at least one plausible mitigating circumstance.[44]

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[43] The Florida Supreme Court has approved overrides in twenty cases. Thirteen of these cases contained dissents. *See Heiney* v. *State*, ___ So.2d ___, 9 Fla. L. Week. 54, 57-8 (Fla. 1984) (Boyd and McDonald, J.J., dissenting); *Lusk* v. *State*, ___ So.2d ___, 9 Fla. L. Week. 39, 41 (Fla. 1984) (Overton and McDonald, J.J., dissenting); *Stevens* v. *State*, 419 So.2d 1058, 1065 (Fla.1982) (McDonald and Overton, J.J., dissenting); *Miller* v. *State*, 415 So.2d 1262, 1264 (Fla. 1982) (McDonald and Overton, J.J., dissenting); *Buford* v. *State*, 403 So.2d 943, 954 (Fla.1981) (England, J., dissenting); *Zeigler* v. *State*, 402 So.2d 365, 377 (Fla.1981) (Sundberg and England, J.J., dissenting); *Johnson* v. *State*, 393 So.2d 1069, 1075-76 (Fla.1981) (McDonald and Overton, J.J., dissenting); *Hoy* v. *State*, 353 So.2d 826, 833 (Fla.1978) (England, J., dissenting); *Barclay* v. *State*, 343 So.2d 1266, 1272 (Fla. 1977) (Hatchett, J., dissenting); *Dobbert* v. *State*, 328 So.2d 433, 444 (Fla. 1976) (England, J., dissenting); *Douglas* v. *State*, 328 So.2d 18, 22 (Fla. 1976) (England, J., dissenting); *Sawyer* v. *State*, 313 So.2d 680, 682 (Fla. 1975) (Ervin, J., dissenting); *Gardner* v. *State*, 313 So.2d 675, 677 (Fla. 1975) (Ervin, J., dissenting).

[44] *See Lusk* v. *State*, ___ So.2d ___, 9 Fla. L. Week. 39, 41 (Fla. 1984) (Overton, J., dissenting) ("The jury could have reasonably believed the appellant's testimony that he had been threatened by the victim and feared for his life"); *Heiney* v. *State*, ___ So.2d ___, 9 Fla. L. Week. 54 (Fla. 1984), Brief of Appellant at 59-61 (doubt about guilt); *Routly* v. *State*, 440 So.2d 1257. (Fla.1983) (domestic difficulties; girlfriend left defendant and spent the night with victim; possible mitigating circumstances of age of defendant, lack of significant criminal activity and extreme emotional disturbance); *Porter* v. *State*, 429 So.2d 293, 296 (Fla.1983) (possible mitigating circumstances of age, lack of significant history of prior criminal activity and employment history); *Bolender* v. *State*, 422 So.2d 833, 837 (Fla.1982) (disparity between sentences received by defendant and codefendant; weakness of evidence of guilt, which was based on testimony of codefendant); *Stevens* v. *State*, 419 So.2d 1058, 1065 (Fla. 1982) (McDonald, J., dissenting) ("the jury could have con-

In reversing the death sentence in *Godfrey*, the Court looked to other Georgia cases on the same point and concluded that a properly limiting standard had been applied in those cases but

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cluded that Stevens participated in the robbery and rape but that [the codefendant] was the sole perpetrator of the homicide"); *Miller* v. *State*, 415 So.2d 1262, 1264 (Fla.1982) (McDonald, J., dissenting) (the homicide was "the combination of a drug and alcohol infested party;" "a psychologist testified that Miller has a weak ego, that he is a 'follower,' that he is whatever his environment may be around him . . ."); *Buford* v. *State*, 403 So.2d 943, 953 (Fla.1981) (doubt about guilt); *Zeigler* v. *State*, 402 So.2d 365, 376 (Fla.1981) ("The evidence establishes . . . the defendant has no significant history of prior criminal activity"); *White* v. *State*, 403 So.2d 331, 339, 340 (Fla.1981) (defendant was an accomplice in the capital felony committed by another and his participation was relatively minor); *Johnson* v. *State*, 393 So.2d 1069, 1075 (Fla.1981) (Sundberg, J., dissenting) ("There is nothing about the actual homicide itself to set it apart from the norm of murders—a single gunshot to the chest with death ensuing instantly and . . . the fussilade of pistol shots was initiated by the victim"); *id.* at 1076 (McDonald, J., dissenting) ("The victim initiated the shooting. . . . The testimony of the psychologist could lead one to believe that the defendant's apparent malevolent act against the victim was in fact an unexplained reaction to being fired at"); *McCrae* v. *State*, 395 So.2d 1145, 1154-55 (Fla.1981) (doctor testified that defendant was under the influence of extreme mental or emotional disturbance at the time the crimes were committed); *Dobbert* v. *State*, 375 So.2d 1069, 1070-71 (Fla.1979) (defendant subjected to childhood child abuse and period of mental stress preceeding the homicide); *Dobbert* v. *State*, 328 So.2d 433, 444 n.* (Fla.1976) (England, J., dissenting) ("by imposing and discussing the basis for consecutive sentences the trial judge anticipated the possibility that reasonable people might differ with him"); *Hoy* v. *State*, 353 So.2d 826, 833 (Fla.1978) (sentencing judge found the defendant's age and lack of prior criminal activity to be mitigating factors) (Governor subsequently commuted sentence to life); *Barclay* v. *State*, 343 So.2d 1266, 1271 (Fla. 1977) (age; minor involvement); *Douglas* v. *State*, 328 So.2d 18 (Fla. 1976) (bizarre love triangle; wife and defendant had previous relationship and lived together for ten days after murder of

not in the case before it. 446 U.S. at 429-33. An analysis of the Florida Supreme Court's override decisions leads to a similar conclusion. In a host of override cases, the Florida Supreme Court has applied the more objective "reasonable basis" test. For example, in *McCampbell* v. *State*, 421 So.2d 1072 (Fla. 1982), the Florida court conducted "an objective review of the record" and found "that the action of the jury was reasonable." *Id.* at 175-76. It held that the jury could have found any of four nonstatutory mitigating circumstances and, in addition, could have considered the disposition of the codefendant's case as reflecting on appropriateness of the death penalty for McCampbell. *Id. Accord Herzog* v. *State*, 439 So.2d 1372 (Fla. 1983) (although judge found no statutory mitigating circumstances, there were nonstatutory mitigating factors including disposition of codefendant's case).

Similarly, in *Cannady* v. *State*, 427 So.2d 723 (Fla. 1983), the court found that "the jury may have given more credence to" certain testimony supporting statutory mitigating circumstances and that, therefore, "there is a reasonable basis for the jury's recommendation of life sentence." *Id.* at 731. This standard was applied to disapprove overrides in numerous other cases. *See, e.g., Richardson*, 437 So.2d at 1095; *Hawkins* v. *State*, 436 So.2d 44 (Fla. 1983); *Washington* v. *State*, 432 So.2d 44 (Fla. 1983); *Norris* v. *State*, 429 So.2d 688 (Fla. 1983).

Thus, although the Florida court has an objective standard that is capable of application in a meaningful manner to avoid arbitrariness in the override of jury life verdicts, it was not applied in petitioner's case. Had it been, the override could not have been affirmed. For as previously discussed, there was a reasonable basis for the jury's life verdict: the weakness of the

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husband); *Sawyer* v. *State*, 313 So.2d 680, 680-81 (Fla.1975) (unintentional killing in the course of a robbery to support a $200 a day heroin habit) (sentence subsequently commuted to life); *Gardner* v. *State*, 313 So.2d 675 (Fla.1975) (husband murders wife after drinking spree in context of alcoholism and marital tension).

evidence regarding petitioner's culpability. The Florida Supreme Court has expressly validated such concerns in *McCampbell* and *Herzog*, where it held that the jury life verdict could reasonably have been based on consideration of the disposition of the codefendant's case. *But compare Davis* v. *State*, 90 So.2d at 632 ("the ultimate verdict at least suggests to us that the jury itself was in doubt [about guilt] and therefore reluctant to impose the supreme penalty. . . . This was, of course, within the orbit of their authority as jurors"); *Nims* v. *State*, 70 So. at 566 (same), *with Buford* v. *State*, 403 So.2d 943, 953 (Fla. 1981) ("A defendant cannot be a 'little bit guilty' ").

The record strongly supports the conclusion that this was both the basis of the jury's verdict and the source of its disagreement with the judge. Unable to consider the "third option," the jury agonized over its verdict at the guilt phase. But the deliberations on sentence were short. The defense attorney specifically argued the weakness of the evidence as a reason for a life verdict, placing this consideration before the jury (TS 16-17). But the judge attempted to remove this factor from the jury's consideration, cutting off counsel's argument as allegedly improper (TS 18). This strongly suggests that the judge's subsequent disagreement with the jury and imposition of the death sentence was based at least in part on his failure to consider this factor.

Finally, the override in this case cannot be justified on the basis of "the prior conviction of a violent felony which the jury did not have an opportunity to consider . . .," *Spaziano*, 433 So.2d at 511; JA 48, for several reasons. First, it was the trial judge who held the prior conviction inadmissible at the penalty phase, thus keeping it from the jury. Second, to approve the override on this basis contravenes the very values that invalidated the sentence in *Bullington*. *See* discussion *supra*, Point II, at 43-44. Allowing a judge to consider in aggravation materials not before the jury would encourage prosecutors to "sandbag" defendants by holding back certain evidence in case the jury returned an advisory verdict of life with the hope of using it to persuade the judge to overrule the jury. Such tactics

by defense lawyers have, in recent years, increasingly drawn the Court's ire. The Constitution "cannot condone a proceeding which, even subtly, detracts from comprehensive consideration of the aggravating and mitigating factors [by the jury] after all parties have agreed on the appropriate evidence to be considered." *Richardson*, 437 So.2d at 1095. In *Richardson*, the trial judge had overridden the jury's life recommendation because the jury "did not have the benefit of all of the evidence." *Id.* at 1095. The Florida Supreme Court reversed the trial judge's override, because it could not "countenance the derrogation of the jury's role implicit in these comments." *Id.*; *cf. Messer* v. *State*, 330 So.2d 137 (Fla. 1976) (rejecting trial judge's reasoning that he could consider mitigating evidence not available to jury before actually imposing sentence); *Miller* v. *State*, 332 So.2d 65 (Fla. 1976) (same). *But see*, *Engle* v. *State*, 438 So.2d 803 (Fla. 1983); *Porter* v. *State*, 429 So.2d 293, 296 (Fla. 1983); *Smith* v. *State*, 403 So.2d 933, 935 (Fla. 1981); *White* v. *State*, 403 So.2d 331, 339-40 (Fla. 1981); *Brown* v. *State*, 367 So.2d 616, 625 (Fla. 1979).

The override of the jury's verdict in this case was based on a standard that cannot be squared with the Constitution. It impermissibly denigrated the jury's function. It unconstitutionally discounted relevant mitigating considerations that could reasonably have formed the basis of the jury's determination that death was not an appropriate punishment

in this case. And it is so vague and subjective, particularly when compared to the standard applied in other Florida cases, that the override in this case is wholly arbitrary.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

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APPENDIX A

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution Of The United States

AMENDMENT V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

AMENDMENT VIII.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

AMENDMENT XIV.

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor

shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Florida Statutes (1973)

782.04 Murder.—

(1)(a) The unlawful killing of a human being, when perpetrated from a premeditated design to effect the death of the person killed or any human being, or when committed by a person engaged in the perpetration of, or in the attempt to perpetrate, any arson, rape, robbery, burglary, kidnapping, aircraft piracy, or the unlawful throwing, placing, or discharging of a destructive device or bomb, or which resulted from the unlawful distribution of heroin by a person over the age of seventeen years when such drug is proven to be the proximate cause of the death of the user, shall be murder in the first degree and shall constitute a capital felony, punishable as provided in § 775.082.

(b) In all cases under this section, the procedure set forth in § 921.141 shall be followed in order to determine sentence of death or life imprisonment.

(2) When perpetrated by any act imminently dangerous to another and evincing a depraved mind regardless of human life, although without any premeditated design to effect the death of any particular individual, or when committed in the perpetration of, or in the attempt to perpetrate, any arson, rape, robbery, burglary, kidnapping, aircraft piracy, or the unlawful throwing, placing, or discharging of a destructive device or bomb, except as provided in subsection (1), it shall be murder in the second degree and shall constitute a felony of the first degree, punishable by imprisonment in the state prison for life or for such term of years as may be determined by the court.

(3) When perpetrated without any design to effect death, by a person engaged in the perpetration of, or in the attempt to perpetrate, any felony other than arson, rape, robbery,

burglary, kidnapping, aircraft piracy, or the unlawful throwing, placing, or discharging of a destructive device or bomb, it shall be murder in the third degree and shall constitute a felony of the second degree, punishable as provided in § 775.082, § 775.083, or § 775.084.

782.07 Manslaughter.—The killing of a human being by the act, procurement or culpable negligence of another, in cases where such killing shall not be justifiable or excusable homicide nor murder, according to the provisions of this chapter, shall be deemed manslaughter and shall constitute a felony of the second degree, punishable as provided in § 775.082, § 775.083, or § 775.084.

921.141 Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.—

(1) SEPARATE PROCEEDINGS ON ISSUE OF PENALTY.—Upon conviction or adjudication of guilt of defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by § 775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If the trial jury has been waived or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (6) and (7) of this section. Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the constitutions of the United States or of the State of

Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(2) ADVISORY SENTENCE BY THE JURY.—After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (6);

(b) Whether sufficient mitigating circumstances exist as enumerated in subsection (7), which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life *[imprisonment] or death.

(3) FINDINGS IN SUPPORT OF SENTENCE OF DEATH.—Notwithstanding the recommendation of a majority of the jury, the court after weighing the aggravating and mitigating circumstances shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (6), and

(b) That there are insufficient mitigating circumstances, as enumerated in subsection (7), to outweigh the aggravating circumstances. In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (6) and (7) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with § 775.082.

(4) REVIEW OF JUDGMENT AND SENTENCE.—The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida within 60 days after certification by the sentencing court of the entire record unless the time is extended for an additional period not to exceed 30 days by the supreme court for good cause shown. Such review by the supreme court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the supreme court.

(5) AGGRAVATING CIRCUMSTANCES.—Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

(6) MITIGATING CIRCUMSTANCES.—Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

932.465 Limitation of prosecutions.—

(1) A prosecution for an offense punishable by death may be commenced at any time.

(2) Prosecution for offenses not punishable by death must be commenced within two years after commission, but if an indictment, information, or affidavit has been filed within two years after commission of the offense and the indictment, information, or affidavit is dismissed or set aside because of a defect in its content or form after the two year period has elapsed, the period for commencing prosecution shall be extended three months from the time the indictment, information, or affidavit is dismissed or set aside.

(3) Offenses by state, county, or municipal officials committed during their terms of office and connected with the

duties of their office shall be commenced within two years after the officer retires from the office.

Florida Rules Of Criminal Procedure (1973)

RULE 3.490. DETERMINATION OF DEGREE OF OFFENSE

If the indictment or information charges an offense which is divided into degrees, without specifying the degree, the jurors may find the defendant guilty of any degree of the offense charged; if the indictment or information charges a particular degree the jurors may find the defendant guilty of the degree charged or of any lesser degree. The court shall in all such cases charge the jury as to the degrees of the offense.

APPENDIX B

FLORIDA JURY OVERRIDE CASES

NAME	JURY VOTE	FLORIDA SUPREME COURT Citation	Result
1. Joseph Taylor	unk.	294 So.2d 648 (Fla. 1974)	life
2. Jimmy Jones	12-0	332 So.2d 615 (1976)	life
3. Anthony Sawyer	unk.	313 So.2d 680 (1975)	upheld[1]
4. Howard Douglas	12-0	328 So.2d 18 (1976)	upheld[2]
5. James McCaskill	11-1	344 So.2d 1276 (1977)	life
6. Otis Williams	7-5	344 So.2d 1276 (1977)	life
7. Larry Thompson	12-0	328 So.2d 1 (1976)	life
8. Daniel Gardner	12-0	313 So.2d 675 (1975)	upheld[3]
9. Lloyd Swan	unk.	322 So.2d 485 (1975)	life
10. Jackson Burch	unk.	343 So.2d 831 (1977)	life
11. Darius Slater	11-1	316 So.2d 39 (1975)	life
12. Ernest Dobbert	10-2	328 So.2d 433 (1976)	upheld
13. James McCray	11-1	395 So.2d 1145 (1981)	upheld
14. Mack Tedder	unk.	322 So.2d 908 (1975)	life
15. Walter Carnes	unk.	Suicide before decision	
16. Michael Provence	unk.	337 So.2d 783 (1976)	life
17. Elwood Barclay	7-5	343 So.2d 1266 (1977)	upheld

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1 Received life sentence from trial court pursuant to motion to mitigate sentence. See Fla. R. Crim. P. 3.800.

2 Federal habeas corpus relief granted. Douglas v. Wainwright, 714 F.2d 1532 (11th Cir. 1983)(cert. pending).

3 Received life sentence following this Court's vacation of death sentence and Florida Supreme Court's subsequent remand for resentencing. See Gardner v. Florida, 430 U.S. (1977).

18. Franz Buckrem	unk.	355 So.2d 111 (1978)	life
19. Glen Chambers	unk.	339 So.2d 204 (1976)	life
20. Henry Brown	unk.	367 So.2d 616 (1979)	life
21. Darrell Hoy	unk.	353 So.2d 826 (1978)	upheld[4]
22. Jesse Hall	unk.	381 So.2d 683 (1980)	new trial, resulting in life
23. Rodney Malloy	unk.	382 So.2d 1190 (1979)	life
24. Ernest Walker	unk.	Suicide before decision	
25. Joseph Spaziano	unk.	433 So.2d 508 (1983)	upheld
26. William Zeigler	unk.	402 So.2d 365 (1981)	upheld
27. Sonia Jacobs	unk.	396 So.2d 713 (1981)	life
28. Eddie Odum	unk.	403 So.2d 936 (1981)	life
29. Clifford Williams	unk.	386 So.2d 538 (1980)	life
30. Robert Lewis	unk.	398 So.2d 432 (1981)	resent. to life
31. Jack Neary	unk.	384 So.2d 881 (1980)	life
32. Alonzo Bryant	unk.	412 So.2d 347 (1982)	new trial, resulting in life
33. John Barfield	7-5	402 So.2d 377 (1981)	life
34. Robert Buford	unk.	403 So.2d 943 (1981)	upheld
35. Roy McKennon	unk.	403 So.2d 389 (1981)	life
36. Beauford White	unk.	403 So.2d 331 (1981)	upheld[5]
37. James Phippen	unk.	389 So.2d 991 (1980)	life
38. David Goodwin	unk.	405 So.2d 170 (1981)	life
39. Durham Stokes	unk.	403 So.2d 377 (1981)	life

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[4] Death sentence subsequently commuted to life by Executive Clemency on June 12, 1980.

[5] Death sentence vacated by state post-conviction judge; state's appeal to the Florida Supreme Court pending.

40. William Welty	unk.	402 So.2d 1159 (1981)	life
41. Raleigh Porter	unk.	429 So.2d 293 (1983)	upheld
42. Guy Smith	8-4	403 So.2d 933 (1981)	life
43. Marvin Johnson	unk.	393 So.2d 1069 (1981)	upheld
44. Robert Heiney	unk.	____ So.2d ___, 9 Fla. L. Week. 54 (1984)	upheld
45. Thomas McCampbell	unk.	421 So.2d 1072 (1982)	life
46. Greg Engle	unk.	___ So.2d ___, 8 Fla. Law. Week 357 (1983)	resent.
47. Rufus Stevens	unk.	419 So.2d 1058 (1982)	upheld
48. Solomon Webb	unk.	433 So.2d 496 (1983)	life
49. Bobby Lusk	unk.	___ So.2d ___, 9 Fla. L. Week 39 (1984)	upheld
50. William Gilven	unk.	418 So.2d 996 (1982)	life
51. Earnest Miller	unk.	415 So.2d 1262 (1982)	upheld
52. Bernard Bolander	unk.	422 So.2d 833 (1982)	upheld
53. Gregory Mills	unk.	Pending, No. 59,140	
54. Michael Cannady	unk.	427 So.2d 723 (1983)	life
55. Donald Walsh	unk.	418 So.2d 1000 (1982)	life
56. Ervin McCray	unk.	416 So.2d 804 (1982)	life
57. Ricky Washington	12-0	432 So.2d 44 (1983)	life
58. Connie Livingston	unk.	___ So.2d ___, 8 Fla.L. Week. 420 (1983)	new trial
59. Dan Routly	unk.	440 So.2d 1257 (1983)	upheld
60. Derwin Norris	unk.	429 So.2d 688 (1983)	life
61. Anibal Jaramillo	12-0	417 So.2d 257 (1982)	released[6]
62. Ed Thomas	12-0	Pending, No. 61,170	
63. Fred Herzog	unk.	439 So.2d 1372 (1983)	life
64. Aubrey Livingston	unk.	Pending, No. 61,967	

6 Florida Supreme Court held evidence of guilt insufficient to convict.

65. Robert Richardson	10-2	437 So.2d 1091 (1983)	life
66. David Hawkins	6-6	436 So.2d 44 (1983)	life
67. Freddie Jones	unk.	Pending, No. 62,098	
68. Adelbert Rivers	12-0	Pending, No. 62,127	
69. Charles Burr	unk.	Pending, No. 62,365	
70. David Gorham	8-4	Pending, No. 62,882	
71. Larry Brown	unk.	Pending, No. 62,922	
72. Alphonso Cave	6-6	Pending, No. 63,172	
73. Isaac Thompson	unk.	Pending, No. 63,398	
74. Juan Ramos	11-1	Pending, No. 63,444	
75. Bobby Francis	unk.	Pending, No. 64,148	
76. Robert Parker	unk.	Pending, No. 63,700	
77. Anthony Brown	unk.	Pending, No. 64,247	
78. William Eutzy	unk.	Pending, No. 64,212	
79. Harry Huddleston	12-0	Pending, No. 64,307	
80. Donald Brookings	unk.	Pending, No. 64,221	
81. Ira Amazon	7-5	Pending, No. 64,117	
SEXUAL BATTERY ONLY:			
82. William Shue	unk.	366 So.2d 387 (1978)	life
83. Lucious Andrews	12-0	___ So.2d ___, 8 Fla. L. Week. 495 (1983)	=new trial; no death

General Source: Post-Furman Death Sentences in Florida (Unpublished compilation prepared by the Capital Punishment Project, Department of Sociology, University of Florida, Michael Radelet, Director) (copy available from counsel for petitioner).

APPENDIX C

JUDGE/JURY ROLES IN CAPITAL PENALTY DETERMINATIONS

A Survey of National Legislative Practice
1972-1984

1. Jury Life Verdict Binding

ARKANSAS	Crim. Code (1977) §41-1301 & §41-1302	L
CALIFORNIA	Penal Code (1979) §190.3-190.4	U
COLORADO	Rev. Stats. (1979 Cum. Supp.) §16-11-103	L
CONNECTICUT	Gen. Stats. Ann. (1980) §53a - 46a	U (?)
DELAWARE	Code Ann (1982) §11-4209	L
GEORGIA	Code Ann §§17-10-30 to 17-10-32 (Recodified 1983) See Miller v. State, 229 S.E.2d 376 (Ga. 1976)	L
ILLINOIS	Ann. Stats (1982) §38-9-1	L
KENTUCKY*	Rev. Stats. (1978 Cum. Supp.) S532.025	U (?)
LOUISIANA	Code of Crim. Proc. (Pck. Pt. 1979) Art. 905.8	L
MARYLAND	Ann. Code Art. 27, §413 (Amended 1983)	L
MASSACHUSETTS	1982 Chapter 279, §68	L
MISSISSIPPI	Code (1983 Cum. Supp.) §99-19-101	L

MISSOURI	Crim. Code (1979 Spec. Pamph.) 565.006	L
NEVADA	Rev. Stats. (1977) §§175.554, 556	U
NEW JERSEY	Statutes (1982) §2C: 11-1, et seq.	L
NEW HAMPSHIRE	Rev. Stats. Ann. (1977 Supp.) §630.5	L
NEW MEXICO	Stats. Ann. (1979 Supp.) §31-20A-3	L
NORTH CAROLINA	Gen. Stats. (1978) §15A-2000	L
OHIO	Rev.Code (1981 Legislation, File 60) §2929.024(D)(2)	L
OKLAHOMA	Stats. Ann. (1978-1979 Pck. Pt.) §21-701.11	L
PENNSYLVANIA	Act No. 1978-141: §18-1311	L
SOUTH CAROLINA	Code. Ann. (1978 Cum. Sup.) §16-3-20	L
SOUTH DAKOTA	State Laws (1979) Chapter 160: S23A-27A-4	L (?)
TENNESSEE	Code Ann. (1983 Cum. Sup.) §39-2-203	L
TEXAS	Code Crim. Proc. Art. §37.071	T
UTAH	Crim. Code (1978) §76-3-207	L
VIRGINIA	Code (1979 Cum. Sup.) §19.2-264.4	
WASHINGTON	Rev. Code Ann. (1981 Pck.Pt.) §10.95.030	U

WYOMING	Stats. (1983) §62-2-102	L (?)
UNITED STATES	49 USC §1473 (1976) Antihijacking Act	U

2. Jury Life Verdict Not Binding

ALABAMA	Code (1981) §13A-5-46	A
FLORIDA	Stats. Ann. (1977) §921.141	M
INDIANA	Stats. Ann. (1983) §35-50-2-9	U

3. Penalty Determination by Judge(s) Alone

ARIZONA	Rev.Stats.Ann (1982) §13-703
IDAHO	Code (1978) §19-2515
MONTANA	Rev.Code (1977) §46-18-301
NEBRASKA	Rev. Stats. (1975) §29-2520
OREGON**	Rev. Stats. (1979) §163.116 (Repealed by 1981 Legislative Act, c. 873, §9)

LEGENDS AND NOTATIONS

L ..... Life sentence unless jury unanimously agrees on death

U ..... Unanimous verdict required for either life or death

M ..... Simple majority suffices for verdict of either life or death

A ..... Alabama system: 10 jurors required for death, 7 jurors required for life

T ..... Unique Texas procedure: penalty jury answers special questions on deliberate nature of murder, probability defendant would engage in future acts of dangerous violence, and (if raised) lack of provocation by victim. 12 jurors required to answer "yes" to each question for imposition of a death sentence; 10 jurors suffice to answer any question "no" and prevent death sentence.

* The Kentucky statute is not absolutely clear in its language concerning the finality of a jury decision against death, but in Gall v. Commonwealth, 607 S.W.2d 97, 104 (Ky. 1980) the Supreme Court of Kentucky construed the statute to require a jury finding of at least one aggravating circumstance in the penalty phase before the judge may consider imposing the death penalty. Since the statute calls for written findings of aggravating circumstances by the jury only "if its verdict be a recommendation of death," see Kentucky Rev. Stats. §532.025(3) (1978 Cum.Supp.), it appears that a jury life decision is in effect binding under the Kentucky scheme.

** The Oregon death penalty statute was declared unconstitutional by the Supreme Court of Oregon in State v. Quinn, 623 P.2d 630 (Ore. 1981) on ground that "deliberateness" of capital murder a fact to be determined by the trial judge alone in the penalty phase denied an accused the right to trial by jury.

(?) The Kentucky statute as interpreted by the Supreme Court of Kentucky requires a unanimous jury verdict for death, but the consequences of a jury's failure to agree on the penalty issue are not defined. The Connecticut, Wyoming and South Dakota statutes do not specifically state a unanimity requirement on penalty, but it is fairly assumed. See also Gillers, supra, at 17 n. 73.

OVERALL CATEGORIES

JURY LIFE VERDICT BINDING	30
JURY LIFE VERDICT NOT BINDING	3
PENALTY DETERMINED BY JUDGE(S) ALONE	5
TOTAL JURISDICTIONS	38

PRACTICES WHERE JURIES PARTICIPATE IN DETERMINING PENALTY

JURY RESULT FOR LIFE IMPRISONMENT BINDING	30
JURY RESULT FOR LIFE IMPRISONMENT NOT BINDING	3
SUBTOTAL OF JURISDICTIONS WITH JURY PARTICIPATION	33

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RULES ON JURY PENALTY VOTE

LIFE IMPRISONMENT UNLESS JURY UNANIMOUS FOR DEATH (L)	23
UNANIMITY REQUIRED FOR EITHER LIFE OR DEATH (U)	7*
10 JURORS REQUIRED FOR DEATH 7 FOR LIFE (A)	1*
SIMPLE MAJORITY SUFFICES FOR LIFE OR DEATH (M)	1*
TEXAS PROCEDURE: SPECIAL PENALTY QUESTIONS (T)	1
SUBTOTAL OF JURISIDICTIONS WITH JURY PARTICIPATION	33

*(U) includes Indiana (life decision not binding); (A) includes only Alabama (life not binding); (M) includes only Florida (life not binding). However, the majority rule in Florida is not connected with the nonbinding nature of a life decision under the 1972 statute, since during the period 1872-1972 the same majority rule prevailed but the jury's life decision was final under state law.

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METHOD OF STUDY: This survey includes the latest discretionary death penalty statute passed in each jurisdiction since Furman v. Georgia, 408 U.S. 238 (1972).

THIS SURVEY BASED ON LEGISLATIVE INFORMATION AVAILABLE TO February 14, 1984.

APPENDIX D

UTAH EXECUTIONS: DEATH SENTENCES AND JURY RECOMMENDATIONS

Prior to the decision of Furman v. Georgia, 408 U.S. 238 (1972), Utah had a capital statute which made the penalty mandatory unless the jury recommended mercy. In cases where the jury did recommend mercy, the court was extended discretion to impose a penalty of death or of life imprisonment.

There follows a list of every defendant whose death sentence was executed in Utah between 1948 and 1967, when a moratorium on executions began which was to last nationwide for 10 years while federal constitutional questions were being resolved.

Also, there are listed reports of two Utah cases (in 1941 and 1951) where a death sentence was sustained by the Utah Supreme Court after a jury recommendation of mercy, but was not carried out.

This survey shows that since at least 1948, there were no executions in Utah after jury recommendations of mercy.

DEFENDANTS EXECUTED IN UTAH 1948-1967

Name-Date of Verdict	Dist.Ct. # and Appellate Report
1. Mares, Elisio J. Executed - 9/10/51 Verdict- March 7, 1947	Summit Cnty. 3rd Dist.Ct. #420 State v. Mares, 192 P.2d 861 (Ut. 1948)
2. Gardner, Ray Dempsey- Executed - 9/29/51 Verdict - Dec. 13, 1949	Weber Cnty. 2nd Dist. Ct. #4803 State v. Gardner, 230 P.2d 756, 759 (Ut. 1951)

3.	Neal, Don Jesse Executed - 7/1/55 Verdict - --- (see note)	--- (see note) State v. Neal, 262 P.2d 756, 759 (Utah 1953) Utah S. Ct. noted lack of jury mercy recommendation. Id. at 759.
4.	Braasch, Vern A. Executed 5/11/56 Verdict - Dec. 9, 1949	Iron Cnty. 5th Dist. Ct. #171 State v.Braasch, 229 P. 2d 289 (Ut. 1951)
5.	Sullivan, Melvin L. Executed - 5/11/56 Verdict - Dec. 9, 1949	Same as Braasch (co-defendant) Sub- nomine Braasch
6.	Kirkham, Barton K. Executed - 6/7/58 Verdict - --- (see note)	--- (see note) State v. Kirkham, 319 P.2d 859, 862 (Ut. 1958). Absence of jury mercy recommendation noted in opinion. Id. at 862.
7.	Rodgers, James W. Executed - 3/30/60 Verdict - Dec. 14, 1957	San Juan Cnty. 7th Dist. Ct. Crim. #243 State v. Rodgers. 329 P. 2d 1075 (Ut. 1958)

NOTE: In two cases, Neal and Kirkham, the opinion of the Utah Supreme Court itself mentions the choice of the jury for a verdict of first degree murder without a recommendation of mercy; thus only the appellate citation is given for these cases. Information on the other five cases was obtained from the relevant Judicial District Courts of Utah, where the defendants were tried. In each of these cases, there was a verdict of first degree murder without recommendation for mercy. This is especially striking because customarily Utah juries were provided with separate verdict forms for each possible decision, including guilty of first degree murder with a recommendation for life imprisonment.

DEFENDANTS WITH DEATH SENTENCES AFFIRMED IN UTAH AFTER LIFE RECOMMENDATIONS WHO WERE NEVERTHELESS NOT EXECUTED
(THIS LIST IS NOT NECESSARILY EXHAUSTIVE, ALTHOUGH THERE IS NO SPECIFIC INDICATION THAT OTHER CASES EXIST)

Name	Appellate Opinion Aff'g Sentence & Date Commuted
1. Markham, John	State v. Markham, 112 P.2d 496, 496-497 (Ut. 1941). June, 1941
2. Matteri, Fred	State v. Matteri, 225 P.2d 325, 329-330 (Ut. 1950). June 11, 1951

NOTE: Commutation dates based on records of Utah State Prison, which also confirm that the list of executions taken above from Bowers, Executions in America 385 (1974) is in fact accurate and complete. The records merely say "commuted," giving no details. However, the Utah State Archives are now researching the existence of any public clemency documents in these cases.